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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909

26.

THE OLD NICK PETITIONER,

vs.

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WRIT OF CERTIORARI TO THE TES CIRCUIT COURT OF APPEALS FOR THE CIRCUIT.

PETITION FOR CERTIORARI FILED NOVEMBER 19, 1907.
CERTIORARI AND RETURN FILED JANUARY 11, 1908.

(20,904.)

(20,904.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 205.

THE OLD NICK WILLIAMS COMPANY, PETITIONER,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

INDEX.

	Page.
Transcript from the district court of the United States for the western district of North Carolina	1
Organization of court	1
Transcript of docket entries from Charlotte	1
Bill of indictment	6
Docket entries at Greensboro	14
Order extending defendant's time for filing bill of exceptions	17
Stipulation of counsel as to filing bill of exceptions	18
Order enlarging time for filing record	19
Order issued, *nunc pro tunc*, enlarging time and exception by United States attorney thereto	20
Prayers for special instructions	21
Judge's charge	66
Exceptions to charge	85
Bill of exceptions	86
Charter of Old Nick Williams Co.	86
Testimony of W. H. Woodard	90
A. J. Odom	94
J. F. Goodman	95
J. B. Farmer	95
Francis Stevenson	95
W. G. Sherman	96
I. G. Sherman	96

		Page.
Testimony of	I. Wishon	97
	W. P. Batchellor	97
	W. G. Hobson	97
	R. V. Murphy	97
	A. C. Bruce	98
	J. D. Hutchens	98
	W. F. Joyner	98
	W. F. Schaffer	98
	S. R. Lentz	98
	D. M. Abernathy	99
	John F. Perry	99
	Frank Shoaf	99
	Isaac Baitty	99
	J. M. Craver	99
	A. M. Chandley	100
	J. D. Baker	103
	R. L. Altmayer	103
	W. B. Sellers	103
	P. L. Farris	104
	B. F. Jones	106
	H. B Plummer	107
	M. C. Cutter	107
	E. G. Butler	107
	W. W. Horne	107
	G. S. Wilson	107
	I. Q. Poole	108
	W. M. Mullice	108
	Anderson Williams	108
	S. H. Bailey	109
	J. Herman	109
	J. H. Cassell	109
	Francis Stevenson (recalled)	109
	T. W. Craft	110
	Nick Hutchins	110
	A. J. Kluttz	111
	W. S. Cantey	111
	T. J. Galloway	111
	J. L. Hatch	111
	Wm. McGibboney	112
	T. O. Stout	112
	M. Kaufman	112
	Sig. Samuels	113
	W. T. Womack	113
	J. R. Smith	113
	T. J. Galloway (recalled)	113
	T. C. Baxter	114
	A. T. Aiken	114
	Harry Nissen	114
	J. S. Minor	115
	L. A. Kiser	117
	J. S. Minor (recalled)	117
	E. E. Garner	118
	Wm. T. Johnson	119

Page.
Testimony of Geo. B. Ascher 120
David A. Gates 121
T. A. Peake 121
Hansel Thomas 122
L. A. Hewitt 122
W. S. Russell 123
J. F. Whisnant 123
Samuel Candle 123
A. C. Hare 123
Ed. X. Jackman 123
G. Lee Redman 124
Wm. Johnson (recalled) 124
T. C. McCoy 124
Ed. X. Jackman (recalled) 125
T. A. Peake (recalled) 125
David A. Gates (recalled) 125
E. E. Yarbrough 125
R. B. King 125
Thomas W. King 126
Charles Schall 126
V. S. Root 126
Z. H. Cotner 138
George Brasswell 139
J. H. Hutchenson 139
W. A. Stewart 140
H. S. Harkins 140
Mark W. Brown 141
W. T. Pace 141
J. F. Yarbrough 141
Frank Eddleman 141
J. A. Petrie 141
Harry Nisson (recalled) 142
W. L. Crews 142
E. Vogler 143
O. O. Howard 143
Geo. L. Lyons 143
E. E. Yarbrough (recalled) 143
C. C. Butler 143
E. G. West 144
W. M. Wheeler 144
J. D. Hunt 144
A. D. Porcher 144
J. D. Proctor 144
D. E. Jackson 144
W. M. Poindexter 144
Alonzo Patterson 144
Bob Glenn 145
Junius Douthit 145
W. M. White 145
R. J. Jones 145
H. W. Thompson 145
R. D. Banks 145
W. C. Burnett 146

		Page.
Testimony of	R. D. Banks (recalled)	146
	W. S. Schaffer (recalled)	146
	W. H. Hoover	146
	Mark Teeter	146
	J. N. Hunter	147
	R. M. Helm	147
	P. L. Farris (recalled)	147
	Samuel Tata	147
	F. J. Sizemore	148
	Charley Carter	148
	David Gates (recalled)	148
	W. S. Payton	148
	R. H. Pender	148
	Prestin Buforn	149
	Ace Dinkins	149
	R. B. Sams	149
	—— Chandley (recalled)	158
	G. W. Sheeke (recalled)	158
	J. Will Jones	158
	J. W. Sowers	161
	J. J. Mackey	161
	Rufus Ashworth	161
	J. G. Huff	161
	S. A. Martin	161
	Claybrook James	161
	J. E. Rankin	161
Government rests		161
Testimony of	Dr. T. A. Allen	162
	Dr. R. L. Cooper	162
	Dr. C. M. McCracken	162
	Jason Ashworth	162
	Robert C. Clayton	162
	B. F. Merrill	162
	James Reese	162
	J. R. Grant	162
	S. J. Ashworth	162
	W. C. Early	162
	A. S. Patterson	162
	J. C. Pinnix	163
	G. W. Sheek	164
	R. H. Hardin	164
	R. F. Fox	165
	T. C. McCoy	166
	R. B. Sams	166
	J. M. Bailey	166
	Roscoe Chandley	166
	Milas Parker	166
	F. B. Lawson	166
	J. W. Hendricks	167
	C. P. Deaver	167
	J. L. Council	168
	Z. C. Davis	168
	T. W. Landreth	169

Page.
Testimony of C. B. Stroop 169
W. M. Cowan 170
T. A. Craft 170
Deed, Kennedy *et ux.* to D. C. Foster, May 9, 1905 171
Minute book of defendant 173
Testimony of J. Will Jones 173
Mrs. C. B. Sharpe 173
Col. Bruce 174
E. A. Yates 174
Deed, Old Nick Williams Co. to D. E. Kennedy, February 1, 1904 175
Testimony of A. G. Faulkner 178
J. H. C. Norman 179
—— Yates (recalled) 179
Defendant rests 179
Testimony of W. F. James 179
—— Hatch (recalled) 179
—— Cotner (recalled) 179
Government closes 180
Agreement as to evidence 180
Defendant's requests for instructions 180
Instruction given by the court 181
Exception of defendant, No. 1 182
No. 2 183
No. 3 184
No. 4 187
No. 5 189
No. 6 192
No. 7 195
No. 8 198
No. 9 200
No. 10 202
No. 11 203
No. 12 204
No. 13 206
No. 14 208
No. 15 210
No. 16 214
No. 17 216
No. 18 218
No. 19 219
No. 20 221
No. 21 223
No. 22 225
No. 23 229
No. 24 231
No. 25 232
No. 26 232
Judge's certificate to bill of exceptions 233
Petition for writ of error 233
Assignments of errors 234
Bond and approval 258
Order allowing writ 259
Writ of error 259

Page.
Citation 260
Order to transmit record 261
Clerk's certificate 261
Orders enlarging time to file record 262
Record filed 263
Stipulation to continue 264
Cause continued 264
Motion to dismiss 264
Answer to motion to dismiss 265
Brief for plaintiff in error on motion to dismiss 270
Argument and submission 271
Order denying further argument 275
Opinion 275
Judgment 279
Mandate stayed 279
Petition for rehearing 280
Order allowing time to file brief in support of petition 283
Order refusing rehearing 283
Order further staying mandate 284
Clerk's certificate 284
Clerk's return to writ of certiorari 284
Stipulation as to return to writ of certiorari 285
Writ of certiorari 286

TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF NORTH CAROLINA, } TO-WIT:

At a District Court of the United States for the Western District of North Carolina, begun, and held at the Court House in the City of Greensboro, on the first Monday of October, being the second day of the said month, in the year of our Lord one thousand nine hundred and six.

Present: The Hon. Jas. E. Boyd, District Judge of the Western District of North Carolina.

Among others were the following proceedings, to-wit:

United States
vs.
The Old Nick Williams Company, incorporated. } At Law.

TRANSCRIPT OF DOCKET ENTRIES FROM CHARLOTTE.

UNITED STATES OF AMERICA, WESTERN DISTRICT OF NORTH CAROLINA, IN THE UNITED STATES DISTRICT COURT,
(2) AT CHARLOTTE, N. C., JUNE TERM, 1905.

No. 2636.

United States
vs.
The Old Nick Williams Co., N. G. Williams, D. E. Kennedy, Yadkin Co.

Indictment for Defrauding, etc.
Endorsement, a True Bill.

R. H. GARRETT, Foreman.

United States Witnesses:

R. B. Sams, M. A. Chandley, Francis Stevenson, M. Kaufman, Z. T. Cotner, A. D. Porcher, J. L. Hatch, E. B. Kerns, B. F. Jones, J. Will Jones, J. R. Smith.

June T., 1905, June 16, 1905. Upon motion of District Attorney it is ordered by the court that Instanter Subpœnas be issued for the following witnesses: Manager Clayton Dispensary, Clayton, N. C.. with letters, &c., Manager Pine Level Dispensary, Pine Level, N. C., with record, Manager or Bookkeeper for Berguson and Cutler, Washington, N. C., with records, Manager of Warrenton Dispensary, Warrenton, N. C., with records, George Kerbe, F. F. Lutz, Manager of Louisville Malting Company F. M. Darn, John C. Greaves, (Malt Broker), Manager of Walton & Co., Manager of Kentucky Malting Co., with records, etc., Manager of Horn & Son, Fayetteville, N. C., with records, Manager of Trenton Dispensary, with records, Miss Cora Leak, Manager for Roanoke Rapids Dispensary, Roanoke Rapids, Va., with records, J. H. McElwee, with records, J. C. Pinnix, and Manager of T. O. Stout & Sons, with records. 18 Subpœnas issued.

Order made by the court requiring notice to be issued to the Old Nick Williams Co., to appear Instanter and answer the charges in the bill of Indictment and for copy of the order and a certified copy of bill of indictment be made and served on defendant, made, entered and filed. Certified copy of order made and certified copy of bill of indictment made and put in the hands of the marshal. The case is called for trial. Trial of case set for Monday, June 19th, 1905.

June 16, 1905, order to serve copy of order and certified copy of bill of indictment on the Old Nick Williams Company returned into court endorsed, executed June 16, 1905, by delivering copy of this order and certified copy of bill of indictment to N. Glenn Williams, Pres. Old Nick Williams Company. This June 16, 1905. J. M. Millikan, U. S. Marshal.

June 17, 1905, Subpœna for J. H. McElwee returned endorsed: "Received June 16, 1905, executed June 16, 1905, by reading to the within named witness. J. M. Millikan, U. S. Marshal, by Vance Scoggins, D. M.

June 19, 1905, the defendants, by their counsel, file their plea in abatement and motion to quash. Defendant affidavit of B. A. Horn filed. Motion argued. Motion denied. Defendants except. Exception allowed by the court, signed, sealed and filed.

The defendant, The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy come into court in their own proper person and being informed of the charges in the bill of indictment say for their plea that they are not guilty thereof.

The defendants, through their counsel, move for a bill of particulars. Motion for bill of particulars denied. The de-

fendants move for a continuance for absence of witnesses. Affidavit filed. Motion allowed and cause continued upon affidavit.

Upon motion of the District Attorney, it is ordered by the court that this case with original papers and certified copy of docket entries be transferred to the United States District Court at Greensboro, N. C., and that the case be set for trial on Wednesday of the first week of the October term, 1905. If the District Attorney elects to send another bill of indictment the same shall stand for trial at that term, and shall not be grounds for a continuance.

Instanter Subpœnas are ordered and issued, J. B. Stevenson, and J. H. McElwee, 2 Subpœnas issued.

June 19, 1905, Instanter Subpœna for J. B. Stephenson returned, "Received June 19, 1905, executed June 19th, 1905, by reading to the within named witness, J. M. Millikan, U. S. Marshal, By D. A. Kanipe, D. M."

(3) It is ordered by the court that the defendant, N. G. Williams, give bond in the sum of $2,000.00, two thousand dollars, for his appearance at Greensboro, at October term, 1905, and that the defendant D. E. Kennedy give bond in the sum of one thousand dollars for his appearance at October term, 1905, at Greensboro, N. C.

June 19, 1905, upon the orders of the court the following United States witnesses are recognized in $100 each for their appearance at Greensboro, N. C., at October term, 1905, viz.: A. D. Porcher, J. C. Kendrick, Chas. Schall, W. V. Thompson, Z. H. Cotner, Frank Miller, Frank Fries, W. G. Hobson, I. G. Shermer, Will Shermer, W. T. Womack, H. Cassell, N. M. Mullis, W. P. Batchelor, A. T. LeFils, J. S. Fletcher, E. G. Butler, G. S. Wilson, J. B. Farmer, G. P. Butler, Albert Lyons, John Harding, Wesley Lyons, J. R. Smith, C. C. West, D. F. Stevenson, G. W. Norman, R. F. Burton, W. S. Shaffer, D. M. Abernathy, R. E. Garner, P. L. Wilhelm, S. R. Lentz, J. B. Dennis, J. W. Sowers, J. H. C. Norman, B. F. Jones, W. R. Stikeleather, and J. L. Hatch.

June 19, 1905, Ace Dinkins, a United States witness, is called and failed. Motion for and Judgment *Ni Si*, $200. (For *Sci Fa* see No. 2639). A. C. Brim, a United States witness, is called and failed, motion for and judgment *Ni Si*, $80.00 (For *Sci Fa* see No. 2640). J. C. Dinkins, a United States witness in this case, is called and failed and Judgment *Ni Si*, for $80.00 entered against him. (For *Sci Fa* see No. 2640).

June 20, 1905, upon the orders of the court, J. J. Walker and Cora Leak, U. S. witnesses in this case are recognized in

$100.00 each for their appearance at October term, 1905, at Greensboro, N. C. Recognizances filed.

June 21, 1905, upon the orders of the court the defendant D. E. Kennedy is recognized in one thousand ($1,000.00) dollars with N. G. Williams as surety for his appearance at Greensboro at October term, 1905. Recognizance filed.

June 21, 1905, Subpœna for Manager of T. O. Stout & Sons, returned "I received this writ at Indianapolis, June 19, 1905, and on same day served on the within named T. O. Stout, by reading to and in his hearing and at same time and place, delivered to him a true copy of this writ at Indianapolis, Marion County, Indiana.

June 19, 1905, Henry C. Petit, Marshal, By Alonzo Boyd, Deputy."

June 21, 1905, Subpœna for J. C. Pinnix returned, Received June 17, 1905, Executed June 17, 1905, by reading to the within named witness J. M. Millikan, U. S. Marshal, By D. S. Reynolds, D. M.

June 21, 1905, Upon the orders of the court, B. H. Plummer and Eugene McCorkle, United States witnesses in this case are recognized in $100.00 each for their appearance at Greensboro, October term, 1905. Recognizance filed.

June 22, 1905, Subpœna for J. H. McElwee returned "Received June 19, 1905, Executed June 19, 1905, by reading to the within named witness J. M. Millikan, U. S. Marshal, By Vance Scoggins, D. M.

June 22, 1905, Subpœna for Mgr. of Roanoke Rapids Dispensary returned "Recd. June 20, 1905, and executed upon wit. D. Gillery, Manager of Roanoke Rapids Dispensary, June 20, 1905, in Halifax Co., at Roanoke Rapids, N. C., by delivering to him personally a copy of the within Subpœna, H. C. Dockery, U. S. M., By S. L. Gibson, D. M.

June 22, 1905, Subpœna for Miss Cora Leak returned Received June 17, 1905, Executed June 18, 1905, by reading to the within named witness, J. M. Millikan, U. S. Marshal, By G. A. Carroll, D. M."

J. H. McElwee, a United States witness in this case is called and failed and Judgment *Ni si* entered against him for $80.00. Ordered that if witness files his recognizance in the sum of one hundred dollars, that no *Sci Fa* issue against him.

June 22, 1905, Ordered that Capias-Subpœna be issued for Ace Dinkins returnable to Greensboro, N. C., Octo. term, 1905. Witness to give $500.00 bond for appearance. Ordered that Capias-Subpœna be issued for J. C. Dinkins, returnable to Octo. term, 1905, at Greensboro. Witness to give $200.00 bond for appearance.

Ordered that Capias-Subpœna be issued for Robert Murphy returnable to Octo. term, 1905, at Greensboro. Witness to give $200.00 bond for appearance. Ordered that a Capias subpœna be issued for A. C. Brim returnable to Octo. term, (4) 1905, at Greensboro. Witness to give $200 bond for appearance.

June 22, 1905, Upon the orders of the court, U. S. Wit. M. C. Cutler and G. E. Braswell are recognized in $100.00 each for their appearance at Octo. term, 1905, at Greensboro, N. C. Recognizance filed.

June 22, 1905, Ordered that Subpœna be issued for J. R. Smith and Bertie Cameron returnable to October term, 1905, at Greensboro.

June 23, 1905, Subpœna for Manager Trenton Dispensary returned, "Received June 20, 1905, Executed June 20, 1905, by reading to the within named witness and also leaving a copy of same with the Manager of Trenton Dispensary, H. C. Dockery, Marshal, By R. W. Ward, D. M.

June 23, 1905, Subpœna for Manager of H. R. Horn & Son, Fayetteville, N. C., returned, not executed on account of postponement of case June 21, 1905, H. C. Dockery, U. S. M., By J. T. Sharpe, O. D. M.

June 23, 1905, Subpœna for Geo. Kerber and others returned Executed June 19, 1905, on Strator Bros. Grain Co., by delivering a true copy of the within. Did not execute on other witnesses. This June 21, 1905, A. D. James, U. S. M., By Wm. Blades, D. M.

June 27, 1905, Subpœna for Mgr. or Bookkeeper for Bergerson & Cutler, returned "Received June 20, 1905, Executed June 20, 1905, by reading to the within named witnesses. J. A. Potter, D. M.

June 27, 1905, Subpœna for Mgr. of Warrenton Dispensary returned Received 19, 1905. Executed 20th, 1905, by reading the within to the Manager of the Warrenton Dispensary and leaving a copy, H. C. Dockery, U. S. M., D. A. Morse, D. M."

June 28, 1905, Subpœna for Mgr. of Clayton Dispensary returned, Received June the 20th, 1905, at Smithfield, Executed June the 20th, 1905, by reading to the within named witnesses. H. C. Dockery, U. S. Marshal, By J. B. Dupree, D. M.

June 28, 1905, Subpœna for Mgr. of Pine Level Dispensary returned endorsed, "Received this Subpœna at Smithfield, 20th, 1905, Executed June 21 day, 1905, by reading to the within named witnesses, H. C. Dockery, U. S. Marshal, By J. B. Dupree, D. M.

June 29, 1905, Recognizance of J. H. McElwee, U. S. Witness, taken in $100.00 for his appearance at Greensboro, N. C., Octo. Term, 1905, and filed. (See Minutes.)

2 Subpœnas issued and 4 copies subpœnas issued June 30, 1905.

June 30, 1905, Order impounded books and records of the Old Nick Williams Company, etc., received and filed.

A true copy of the Docket entries and order of transfer.

Test: H. C. COWLES, Clerk.

Endorsed:

Filed in this office Aug. 28, 1905.

SAM'L L. TROGDON, Clerk.

BILL OF INDICTMENT.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE, JUNE TERM, 1905.

(5) First Count. The Jurors for the United States of America, within and for the Western District of North Carolina, upon their oath present that The Old Nick Williams Company (incorporated), a corporation duly incorporated under the laws of North Carolina, with power and authority to engage in and carry on the business of a rectifier of distilled spirits and then and there existing under that name and doing business in the town of Williams, in the district and State aforesaid, with its principal place of business in the said town of Williams, in the county of Yadkin, and State aforesaid, N. G. Williams and D. E. Kennedy, late of said district, on the 1st day of July, 1903, and on other days both before and since said date, being then and there engaged in and carrying on the business of a rectifier of distilled spririts, did then and there unlawfully and wilfully engage in and carry on the business of rectifier of distilled spirits with intent to defraud the United States of the tax upon the spirits so rectified by them, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

(6) 2 Count. And the Jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to-wit, upon the day and year aforesaid, and on other days both before and since said

date, at and in the district aforesaid, and within the jurisdiction of this court, the said The Old Nick Williams Company, (incorporated), being incorporated and existing and doing business as aforesaid, N. G. Williams and D. E. Kennedy, late of said district, being then and there engaged in and carrying on the business of rectifiers of distilled spirits as aforesaid, did then and there unlawfully and wilfully draw off from the rectifier of the distilled spirits so rectified by them four gallons of spirits, and place the same in a certain cask containing and of the capacity to contain less than five wine gallons, to-wit, four and one-half gallons, with intent to send the same out by retail, and without having thereon the marks, stamps and brands placed thereon as required by law, and without the same being inspected and guaged by a United States Gauger as required by law, and did then and there unlawfully and wilfully send the same out from the said place of business in a manner other than is and was allowed by law, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

3 Count. And the Jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to-wit, upon the day and year aforesaid, and on other days both before and since said date, at and in the district aforesaid, and within the jurisdiction of this court, the said The Old Nick Williams Company, incorporated, being incorporated and existing as aforesaid, and doing business as aforesaid, N. G. Williams and D. E. Kennedy, late of said district being then and there engaged in and carrying on the business of rectifiers of distilled spirits as aforesaid, and having paid the special tax as required by law, did then and there unlawfully and wilfully draw off from the said rectifier of the distilled spirits so rectified by them one cask of distilled spirits, and did then and there unlawfully and wilfully send the same out of their place of business in a manner other than is and was provided by law, to-wit, without the same having been inspected and gauged by a United States Gauger as required by law, and without having placed thereon the marks, stamps and brands required by law, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

(7) 4 Count. And the Jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to-wit, upon the day and year aforesaid, and on other days both before and since said date, at and in the district aforesaid, and within the jurisdiction of this court, the said The Old Nick Williams Company,

(incorporated), being incorporated and existing and doing business as aforesaid, N. G. Williams and D. E. Kennedy, late of said district, being then and there engaged in and carrying on the business of rectifiers of distilled spirits in the name of The Old Nick Williams Company, being then and there required by law to keep a book in such form as was then and there prescribed by the Commissioner of Internal Revenue, and being then and there on the same day on which they received any foreign or domestic spirits and before drawing off any part thereof, or adding water or anything else thereto or in any respect altering the same, required to enter in said book, and in the proper columns respectively prepared for the purpose, the date when, the name of the person or firm from whom, and the place from whence, the spirits were received, by whom distilled, rectified or compounded and when and by whom inspected, and, if in the original package, the serial number of each package, the number of wine gallons and proof gallons, the kind of spirits, and the number and kind of adhesive stamps thereon, did then and there receive into their said place of business in the town of Williams, North Carolina, for the purpose of rectifying the same, from A. Dinkins, at Conrads, one cask of distilled spirits, bearing thereon the marks, stamps and brands required by law to be affixed thereon; and did then and there unlawfully and wilfully fail, neglect and refuse to make the entries thereof required as aforesaid in such book, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

(8) 5 Count. And the Jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to-wit, upon the day and year aforesaid, and on other days both before and since said date, and in the district aforesaid, and within the jurisdiction of this court, the said The Old Nick Williams Company, (incorporated), being incorporated and existing and doing business as aforesaid, N. G. Williams and D. E. Kennedy, late of said district, being then and there engaged in and carrying on the business of rectifiers of distilled spirits in the name of The Old Nick Williams Company and being then and there required on or before the 10th day of each month, to make, in a form prescribed by the Commissioner of Internal Revenue, a return to the collector of the 5th Collection District of North Carolina, showing the quantity of spirits received for rectification, and from whom received, the quantity dumped for rectification, the quantity rectified, the quantity removed after rectification, during the preceding month, did then and there recti-

fy during the month of August, 1903, ten barrels of distilled spirits, and did withdraw the same from rectification, and did then and there unlawfully and wilfully, knowingly and designedly fail, neglect and refuse to make return thereof to the Collector aforesaid, as required as aforesaid contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

(9) 6 Count. And the Jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to-wit, upon the day and year aforesaid, and on other days both before and since said date, and in the district aforesaid, and within the jurisdiction of this court, the said The Old Nick Williams Company, (incorporated), being incorporated and existing and doing business as aforesaid, N. G. Williams and D. E. Kennedy, late of said district, being then and there engaged in and carrying on the business of rectifiers of distilled spirits in the name of The Old Nick Williams Company and being then and there required on or before the 10th day of each month, to make, in a form prescribed by the Commissioner of Internal Revenue, a return to the collector of the 5th Collection District of North Carolina, showing the quantity of spirits received for rectification, and from whom received, the quantity dumped for rectification, the quantity rectified, the quantity removed after rectification, during the preceding month, did then and there rectify during the month of September, 1903, ten barrels of distilled spirits, and did withdraw the same from rectification, and did then and there unlawfully and wilfully, knowingly and designedly fail, neglect and refuse to make return thereof to the Collector aforesaid, as required as aforesaid contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

(10) 7 Count. And the Jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to-wit, upon the day and year aforesaid, and on other days both before and since said date, and in the district aforesaid, and within the jurisdiction of this court, the said The Old Nick Williams Company, (incorporated), being incorporated and existing and doing business as aforesaid, N. G. Williams and D. E. Kennedy, late of said district, being then and there engaged in and carrying on the business of rectifiers of distilled spirits in the name of The Old Nick Williams Company and being then and there required on or before the 10th day of each month, to make, in

a form prescribed by the Commissioner of Internal Revenue, a return to the collector of the 5th Collection District of North Carolina, showing the quantity of spirits received for rectification, and from whom received, the quantity dumped for rectification, the quantity rectified, the quantity removed after rectification, during the preceding month, did then and there rectify during the month of October, 1903, ten barrels of distilled spirits, and did withdraw the same from rectification, and did then and there unlawfully and wilfully, knowingly and designedly fail, neglect and refuse to make return thereof to the Collector aforesaid, as required as aforesaid contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

(11) 8 Count. And the Jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to-wit, upon the day and year aforesaid, and on other days both before and since said date, and in the district aforesaid, and within the jurisdiction of this court, the said The Old Nick Williams Company, incorporated, being incorporated and existing and doing business as aforesaid, N. G. Williams and D. E. Kennedy, late of said district, being then and there engaged in and carrying on the business of rectifiers of distilled spirits in the name of The Old Nick Williams Company and being then and there required to keep a certain book in a form prescribed by the Commissioner of Internal Revenue, and to enter therein in the proper columns, respectively, prepared therefor, showing the quantity of spirits dumped for rectification, the quantity rectified, and the quantity removed after rectification, the date received from rectification, the number of wine and proof gallons, the kind of spirits, the serial number of rectifiers stamps, the date of inspection and the name of Gauger, did then and there empty for rectification, and receive from rectification, ten casks of distilled spirits so rectified by them, and did then and there unlawfully and wilfully, knowingly and designedly fail, neglect and refuse to make the entries thereof in said book required as aforesaid, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

(12) 9 Count. And the Jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to-wit, upon the day and year aforesaid, and on other days both before and since said date, and in the district aforesaid, and within the jurisdiction of this court, the said The Old Nick Williams Company,

incorporated, being incorporated and existing and doing business as aforesaid, N. G. Williams and D. E. Kennedy, late of said district, being then and there engaged in and carrying on the business of rectifiers of distilled spirits in the name of The Old Nick Williams Company and being then and there required by law to provide and keep a book, in such form as was then and there prescribed by the Commissioner of Internal Revenue and to enter therein the date when they sent out spirits at the time of sending the same out, the serial number of the package containing the same, the kind and quality of spirits in wine gallons and taxable gallons, the serial number of the stamps on the packages, and the name and residence of the person to whom sent, did then and there send out of the spirits so rectified by them one cask of distilled spirits to a person and place to the jurors unknown, and did then and there unlawfully and wilfully fail, neglect and refuse to enter upon said book, at the time they sent the same out, the name and residence of the person to whom the same was so sent as aforesaid with intent to defraud the United States of its tax, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

(13) 10 Count. And the Jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to-wit: on the day and year aforesaid, at and in the district aforesaid, and within the jurisdiction of this court, the said The Old Nick Williams Company, incorporated, a corporation duly incorporated under the laws of North Carolina, with power and authority to engage in and carry on the business of rectifier of distilled spirits, and then and there existing under that name and doing business in the town of Williams, in the county of Yadkin, and State aforesaid, N. G. Williams and D. E. Kennedy, late of said district, on the 1st day of May, 1904, and on other days both before and since said date, being then and there engaged in and carrying on the business of rectifier of distilled spirits, did unlawfully, wilfully and fraudulently use a certain cask having thereon a certain Internal Revenue Stamp, to-wit: a rectifiers stamp, which said cask had theretofore contained ditilled spirits inspected therein and contained therein at the time of affixing said stamp, by then and there putting into said cask for the purpose of selling the same, distilled spirits other than the spirits and of quality different from the spirits so previously inspected therein, with intent to defraud the United States of its tax, contrary to the form of the Statute of the United States in such case made and provided and against the peace and dignity of the United States. (3326.)

11 Count. And the Jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to-wit: upon the day and year aforesaid, and on other days both before and since said date and in the district aforesaid, and within the jurisdiction of this court, the said The Old Nick Williams Company, (incorporated), being incorporated and existing and doing business as aforesaid, N. G. Williams and D. E. Kennedy, late of said district, being then and there engaged in and carrying on the business of rectifier of distilled spirits in the name of The Old Nick Williams Company, being then and there required by law to keep a book, in such form as was then and there prescribed by the Commissioner of Internal Revenue, and being then and there on the same day on which they received any foreign or domestic spirits before drawing off any part thereof, or adding water or anything else thereto or in any respect altering the same, required to enter in said book, and in the proper columns, respectively, prepared for the purpose, the date when, the name of the person or firm from whom, and the (14) place from whence, the spirits were received, by whom distilled, rectified or compounded and when and by whom inspected, and if in the original package, the serial number of each package, the number of wine gallons and proof gallons, the kind of spirits, and the number and kind of adhesive stamps thereon, did then and there receive into their said place of business in the town of Williams, North Carolina, for the purpose of rectifying the same, one cask of distilled spirits, and did then and there unlawfully and wilfully fail, neglect and refuse to make the entries thereof required as aforesaid, in said book, contrary to the statute of the United States in such case made and provided and against the peace and dignity of the United States.

12 Count. And the Jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to-wit: on the day and year aforesaid, and on other days both before and since said date, and in the district aforesaid, and within the jurisdiction of this court, the said The Old Nick Williams Company, a corporation duly incorporated under the laws of North Carolina, with power and authority to engage in and carry on the business of distiller of spiritous liquors, and then and there existing under that name and doing business in the town of Williams, in the district and State aforesaid, with its principal place of business in the town of Williams, in the county of Yadkin, and State aforesaid, N. G. Williams and D. E. Kennedy, late of said district, on the 1st day of May, 1904, and on other days both before and since said date, being then and there

engaged in and carrying on the business of distiller of spiritous liquors, did then and there unlawfully and wilfully engage in and carry on the business of distiller of spiritous liquors with intent to defraud the United States of the tax upon the spirits so distilled by them, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

(15) 13th Count. And the Jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to-wit: upon the day and year aforesaid and on other days both before and since said date, and in the district aforesaid, and within the jurisdiction of this court, the said The Old Nick Williams Company, (incorporated), being incorporated and existing and doing business as aforesaid, N. G. Williams and D. E. Kennedy, late of said district, being then and there engaged in and intending to engage in the business of distillers of spiritous liquors from grain, and being then and there required to give a certain notice in writing to the Collector of Internal Revenue for the 5th Collection District, stating therein the name and names and residence of every person interested and to be interested in the said business did then and there in connection therewith unlawfully and wilfully give and cause to be given to the Collector aforesaid a certain false notice in writing and signed by D. E. Kennedy and stating therein, among other things, that the name of every person interested and to be interested in the said business, including every member of the firm, and stockholder of the corporation, the name, interest with, residence, to be D. E. Kennedy, Williams, North Carolina, when in truth and in fact the said D. E. Kennedy was not the only person interested therein, but that the same was owned and operated by the said The Old Nick Williams Company, incorporated, N. G. Williams, and other persons to the jurors unknown, the said The Old Nick Williams Company (incorporated), N. G. Williams, and D. E. Kennedy well knowing the same, and well knowing the said notice to be false as aforesaid, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

14 Count. And the Jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to-wit; upon the day and year aforesaid, at and in the district aforesaid, and within the jurisdiction of this court, the said The Old Nick Williams Company, incorporated as aforesaid, N. G. Williams and D. E. Kennedy, late of said district, laborer, did unlawfully and wilfully remove one cask of distilled spirits on which the tax

had not been paid, as required by law, to a place other than a distillery warehouse provided by law, contrary to the form of the statute of the United States in such case made and provided (16) and against the peace and dignity of the United States. (Sec. 3296, R. S.)

15 Count. And the Jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to-wit; upon the day and year aforesaid, at and in the district aforesaid, and within the jurisdiction of this court, the said The Old Nick Williams Company, incorporated as aforesaid, N. G. Williams and D. E. Kennedy, late of said district, laborer, did unlawfully and wilfully conceal one cask of distilled spirits on which the tax had not been paid, removed to a place other than a distillery warehouse provided by law, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States. (Sec. 3296 R. S.)

A. E. HOLTON,
U. S. District Attorney.

United States Witnesses:

xR. B. Sams, xM. A. Chandley, xFrances Stevenson, xM. Kauffman, xZ. T. Cotner, A. D. Porcher, J. L. Hatch, E. B. Kearnes, xB. F. Jones, xJ. Will Jones, J. R. Smith.

Those marked x sworn by the Foreman of and and in the presence of the Grand Jury.

R. H. GARRETT, Foreman.

A True Bill.

R. H. GARRETT, Foreman.

Endorsed: Filed in this office, June 16th, 1905.

H. C. COWLES, Clerk.

Endorsed: Filed in this office, August 28, 1905.

S. L. TROGDON, Clerk.

DOCKET ENTRIES AT GREENSBORO.

(17) Be it remembered that on this Monday, October 2nd, a regular term of the District Court of the United States, begun, opened and held for the Western District of North Carolnia, in the city of Greensboro, and continued from day to day until October 21st when the court was adjourned over to Octo-

ber 23rd when the business of the term was again resumed and continued from day to day until November 28th, 1906.

Present: Hon. Jas. E. Boyd, U. S. District Judge, presiding.

Present also: Hon. A. E. Holton, U. S. District Attorney, Hon. J. M. Millikan, U. S. Marshal, and Sam'l L. Trogdon, Clerk of said Court.

Among others were the following proceedings, to-wit:

4627.

United States
vs.
Old Nick Williams Co., N. Glenn Williams, D. E. Kennedy, Yadkin County.

Indictment: Defrauding of tax, etc.

Octo. 23rd, 1905, Case is called for trial and the defendants appear.

Upon motion of the District Attorney it is ordered by the court that the defendants be arraigned.

The defendants are arraigned at the bar and in their own proper person enters the plea of not guilty and of this they put themselves upon their country and the United States through the District Attorney doth the like.

Thereupon it is ordered by the court that a jury of good and lawful men come by whom the truth of the matter may be better known.

The following jurors, to-wit:

J. H. Poindexter, M. H. Robertson, D. A. Murray, W. I. Witty, J. H. Davis, Thos. F. Wilson, Chas. M. Bowman, Jesse Morris, Noah H. Smith, W. Rufus Tuttle, Thomas Gourley, James Smith, having heretofore been chosen, tried and sworn in manner and form provided by law; are questioned and passed by the United States and the defendants and are now duly empannelled to try this case.

Octo. 31, in this case after the jury has been empannelled and during progress of the trial, and the testimony on the part of the prosecution partially taken, one of the jurors, Thomas F. Wilson, being taken ill, so that he is confined to his room; and his illness being of such character that he is unable to serve further as a juror in the case, the court doth now find as a fact that the said juror is not able, on account of his sickness, to further serve in the case, therefore, and for this reason, a mistrial is ordered and the jury is discharged.

Octo. 31. Case is called for trial and the defendants appear.

Upon motion of the District Attorney it is ordered by the court that the defendants be arraigned. The defendants are arraigned at the bar and in their own proper person enters the plea of not guilty and of this they put themselves upon their country and the United States, through the District Attorney, doth the like.

Thereupon it is ordered by the court that a jury of good and lawful men come by whom the truth of the matter may be better known.

The following jurors, to-wit:

M. H. Robertson, W. I. Witty, James Smith, J. R. Cutchin, A. C. Rankin, W. R. Land, D. A. Murray, Noah H. Smith, Thomas Gourley, J. H. Rankin, W. H. Reese, W. H. Turner, having heretofore been chosen, tried and sworn in manner and form provided by law; are questioned and passed by the United States and the defendants and are now duly empannelled to try this case.

It is ordered by the court that the jury empannelled in this (18) case be kept together and placed in the care of a sworn officer, and provided with meals and comfortable accommodation. J. T. Millikan, duly sworn as an officer in charge of the jury.

Nov. 27, 1905, at 11 o'clock the judge proceeds to charge the jury.

At 12:26 the judge concludes his charge to the jury.

At the conclusion of his Honors charge, and before the jury had left the box, Chas. A. Moore, Esq., one of the attorneys for the defendants, hands up to the court exceptions to refusal to charge defendants requests, &c., and exceptions to the charge as given.

The jury retire to the jury room to agree upon a verdict.

At 12:36 the judge directs the marshal to bring the jury into open court for further instructions and after having received same, at 12:43 retire to the jury room.

November 28, at 10:10 A. M., the jury comes into open court and the clerk calls the names of the jury to which each juror responds.

Upon being questioned by the clerk as to whether they had agreed, J. R. Cutchin, acting as foreman, announces that they have.

Thereupon the clerk inquires as to what they say for their verdict, and through their foreman, J. R. Cutchin, they render the following verdict each jury assenting thereto.

1st Count. For carrying on a rectifying business with intent to defraud the Government, we, find The Old Nick Williams Company incorporated, guilty.

2nd. Failure to enter on its books for rectifying: Not guilty as to all the defendants.

3rd. Carrying on the business of distilling with intent to defraud the government, Not guilty as to all the defendants.

4th. Making false notice: Not guilty as to all the defendants.

5th. Defrauding the Government by moving distilled spirits before paying the tax. Not guilty as to all the defendants.

At 2:30 the court reconvenes.

Defendants counsel file motion in arrest of judgment. The motion is overruled by the court in which the defendants except. Defendants counsel move to set aside the verdict of the jury and for a new trial. Overruled and defendants excepted.

District Attorney prays the judgment of the court.

The judgment of the court is that the Old Nick Williams Co., incorporated, pay a fine of five thousand dollars and be taxed with the costs of this proceeding.

Ordered that execution issue therefor against property and effects of the said company.

Defendants counsel except to this judgment.

Defendants counsel to have 90 days to prepare and serve bill of exceptions.

District attorney allowed 30 days after the preparation and serving of the defendants bill of exceptions to prepare his exceptions thereto, after which, his Honor will settle the bill of exceptions upon 10 days notice to the attorneys of the parties.

And when said bill of exceptions is filed, they may be deemed as made in apt time.

ORDER EXTENDING DEFENDANT'S TIME FOR FILING BILL OF EXCEPTIONS.

(19)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

FOURTH CIRCUIT, AT GREENSBORO.

United States of America *vs.* The Old Nick Williams Company.	Order.

In the above entitled action it is ordered, by consent, that the time of The Old Nick Williams Company for the prepara-

tion and filing of its bill of exceptions in the above entitled case shall be extended to the 15th day of March, 1906.

This the 17th day of January, 1906.

JAS. E. BOYD,
U. S. Judge.

By consent:
A. E. HOLTON,
U. S. Attorney.
BURWELL & CANSLER, BYNUM, SETTLE, ALEXANDER & MOORE & ROLLINS,
Attorneys for The Old Nick Williams Company.

Endorsed:

Filed in this office Jan. 17, 1906.

SAM'L L. TROGDON, Clerk.

STIPULATION OF COUNSEL.

(20)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA,
AT GREENSBORO.

United States of America,
vs.
Old Nick William Company.
Stipulation.

In this above entitled case it is agreed that the Old Nick Williams Company shall have until April 1st, 1906, in which to prepare and file Bills of Exceptions proposed by it, and the United States the time thereafter allowed in former order to file exceptions thereto. The effect of this stipulation shall be to give unto said company time to prepare and file the same in compliance with the order heretofore made herein until April 1, 1906, which filing shall be taken and deemed as done at the trial term of said cause and in apt and due time.

This the 28th day of February, 1906.

A. E. HOLTON,
U. S. Attorney.
BYNUM, SETTLE,
BURWELL & CANSLER,
MOORE & ROLLINS,
Of Counsel for Defendant.

It is ordered as above stipulated.

JAS. E. BOYD,
U. S. Judge.

Endorsed:

Filed in this office March 1, 1906.

SAM'L L. TROGDON, Clerk.

ORDER ENLARGING TIME FOR FILILG RECORD.

(21)

UNITED STATES OF AMERICA, IN THE CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

Old Nick Williams Company, Plaintiff in Error,
vs.
United States of America, Defendant in Error.

ORDER ENLARGING TIME FOR DOCKETING CASE IN UNITED STATES CIRCUIT COURT OF APPEALS.

For good cause shown, the undersigned judge who signed the citation herein, does hereby enlarge and extend the time for docketing and filing the record in this above entitled case in the United States Circuit Court of Appeals until the 1st day of September, 1906.

This June 26th, 1906.

JAS. E. BOYD,
U. S. Judge.

Endorsed:

Filed in this office June 26th, 1906.

SAM'L L. TROGDON, Clerk.

ORDER ISSUED NUNC PRO TUNC, ENLARGING TIME AND EXCEPTION BY U. S. ATTORNEY THERETO.

(22)

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, FOURTH CIRCUIT, AT GREENSBORO.

United States of America,
vs.
Old Nick Williams Company.

Order.

It appearing to the court that the defendant, Old Nick Williams Company, has filed with the clerk of this court within the time required by the order of the court its bill of exceptions, to which, within the time required by the order of the court, the United States District Attorney filed certain objections and amendments, and that the bill of exceptions has not been settled, signed and sealed by the court within six months from the date of the entry of judgment herein; and the court being of opinion that the defendant, Old Nick Williams Company, is entitled, under the circumstances, to have said bill of exceptions settled and a writ of error and citation issued and served *nunc pro tunc* and as within the time required by law, to procure a review of the judgment of the court pronounced against it.

It is now ordered that the parties or their attorneys appear before the undersigned at his chambers at Greensboro, N. C., on the 7th day of August, 1906, when and where said bill of exceptions will be settled, signed and sealed by the court.

It is further ordered that when said bill of exceptions shall have been settled, signed and sealed by the court, that, after petition for writ of error and assignments of error shall have been filed by the defendant, a writ of error and citation in due form be issued and served, all of which shall bear date as of the 15th day of April, 1906, said date being the date on which said defendant filed its proposed bill of exceptions with the clerk herein and within the period of six months from the date of the entry of the judgment herein aforesaid.

This the 27th day of July, 1906.

JAS. E. BOYD,
United States Judge.

The clerk will issue notice hereof to the U. S. District Attorney and to the attorneys of record of the Old Nick Williams Company.

JAS. E. BOYD,
U. S. Judge.

The United States Attorney for and on behalf of the United States excepts to the above order and especially to that part allowing a writ of error after the lapse of six months from the judgment in the case. The exception is allowed by the court.

JAS. E. BOYD,
U. S. Judge.

Endorsed:

Filed in this office Aug. 1, 1906.

SAM'L L. TROGDON, Clerk.

PRAYERS FOR SPECIAL INSTRUCTIONS.

(23) "At the close of the testimony, defendants' counsel presented to the court the following prayers for special instructions to the jury, numbering 185 and covering 60 typewritten pages.

UNITED STATES OF AMERICA, WESTERN DISTRICT OF NORTH CAROLINA, FOURTH CIRCUIT, AT GREENSBORO.

United States
vs.
The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy.

PRAYERS FOR INSTRUCTIONS BY DEFENDANTS.

Now come the defendants, The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy, by their attorneys, J. E. Alexander, Thomas Settle, W. P. Bynum, Jr., Burwell & Cansler, and Moore & Rollins, at the close of the testimony, in apt time, and before the beginning of the argument, and request in writing of the court the following special instructions:

1. There is no evidence in this case that the defendant, N. Glenn Williams, was engaged in carrying on the business of a rectifier of distilled spirits with intent to defraud the United States of the tax upon the spirits rectified by him, as charged in the first count in the bill of indictment, and the jury will, therefore, find the said defendant not guilty of the offense charged in the said first count in said bill.

2. There is no evidence in this case that the defendant, N. Glenn Williams, was engaged with The Old Nick Williams Company and D. E. Kennedy in carrying on the business of rectifier of distilled spirits with intent to defraud the United States of the tax upon the spirits rectified by them, as charged in the first count in the bill, and the jury will therefore find the defendant, N. Glenn Williams, not guilty of said charge in said first count contained.

3. There is no evidence in this case that the defendant, (24) D. E. Kennedy, was engaged in carrying on the business of rectifier of distilled spirits with intent to defraud the United States of the tax upon the spirits rectified by him, as charged in the first count in the bill of indictment, and the jury will, therefore, find the said defendant not guilty of the offense charged in the said first count in said bill.

4. There is no evidence in this case that the defendant, D. E. Kennedy, was engaged with The Old Nick Williams Company and N. Glenn Williams in carrying on the business of rectifier of distilled spirits with intent to defraud the United States of the tax upon the spirits rectified by them, as charged in the first count in the bill, and the jury will therefore find the defendant, D. E. Kennedy, not guilty of said charge in said first count contained.

5. Upon all the evidence in this case, the court instructs the jury to find the defendant, The Old Nick Williams Company, not guilty of the charge contained in the first count in the bill.

6. There is no evidence in this case that the defendant, N. Glenn Williams, was engaged in carrying on the business of rectifier of distilled spirits as charged in the second count of the bill of indictment, and the jury will therefore find the said N. Glenn Williams not guilty of the offense charged in said second count of said bill.

7. There is no evidence in this case that the defendant, N. Glenn Williams, was engaged with the defendants The Old Nick William Company and D. E. Kennedy in carrying on the business of rectifiers of distilled spirits as charged in the second count of the bill of indictment and the jury will therefore find the said N. Glenn Williams not guilty of the offense charged in said second count of said bill.

8. There is no evidence in this case that the defendant, N. (25) Glenn Williams, drew off from the rectifier four and one-half (4½) gallons of distilled spirits rectified by The Old Nick Williams Company, D. E. Kennedy, and himself, as charged in the second count in the bill of indictment, with intent to send the same out by retail, without having thereon the marks, stamps, and brands and without the same being inspected and gauged by the United States Gauger, as required by law, as charged in said count in said bill and the jury will therefore find the defendant, N. Glenn Williams, not guilty of the offense charged in said second count in said bill.

9. There is no evidence in this case, if the offense charged in the second count in the bill of indictment was committed at all, that it was committed with the knowledge and consent of the defendant, N. Glenn Williams, and the jury will therefore acquit the said defendant of the offense charged in said second count of said bill.

10. Before you can convict the defendant, N. Glenn Williams, of the offense charged in the second count of the bill of indictment, you must not only be satisfied beyond a reasonable doubt that said offense was in fact committed by some one, but you must be further satisfied beyond a reasonable doubt that it was either committed by N. Glenn Williams in person, or by some other person with his knowledge and consent, and unless you shall so find you will find the said defendant not guilty of the offense charged in said count in the bill.

11. There is no evidence in this case that the defendant, D. E. Kennedy, drew off from the rectifier four and one-half (4½) gallons of distilled spirits rectified by The Old Nick Williams Company, N. Glenn Williams and himself, as charged in the second count in the bill of indictment, with intent to send the same out by retail, without having thereon the marks, stamps and brands and without the same being inspected and gauged by the United States Gauger, as required by law, as charged in said count in said bill and the jury will therefore find the (26) defendant, D. E. Kennedy, not guilty of the offense charged in said second count in said bill.

12. There is no evidence in this case, if the offense charged in the second count in the bill of indictment was committed at all, that it was committed with the knowledge and consent of the defendant, D. E. Kennedy, and the jury will therefore acquit the said defendant of the offense charged in said second count of said bill.

13. Before you can convict the defendant, D. E. Kennedy, of the offense charged in the second count of the bill of indictment, you must not only be satisfied beyond a reasonable doubt that said offense was in fact committed by some one, but you must be further satisfied beyond a reasonable doubt that it was either committed by D. E. Kennedy in person, or by some other person with his knowledge and consent, and unless you shall so find you will find the said defendant not guilty of the offense charged in said second count in the bill.

14. Upon all the evidence in this case the court charges the jury to find the defendant, The Old Nick Williams Company, not guilty of the offense charged in the second count in the said bill of indictment.

15. Before you can convict The Old Nick Williams Company of the offense charged in the second count in the bill of indictment, the jury must be satisfied beyond a reasonable doubt, not only that the acts there charged were committed by some one, but that they were done with the knowledge and consent of some officer or authorized agent of The Old Nick Williams Company, and unless the jury shall so find beyond a reasonable doubt, they will acquit the said defendant of the offense charged in the second count in said bill.

16. There is no evidence in this case that the defendant, N. Glenn Williams, was engaged with the defendants, The Old (27) Nick Williams Company and D. E. Kennedy, in carrying on the business of rectifier of distilled spirits, having paid the special tax as such rectifiers as required by law, as charged in the third count in the bill of indictment, and the jury will therefore acquit the said N. Glenn Williams of the offense charged in said count in said bill.

17. There is no evidence in this case that the defendant, N. Glenn Williams, drew off from the rectifier or cask of distilled spirits rectified by The Old Nick Williams Company, D. E. Kennedy and himself, as charged in the third count in the bill of indictment, and sent the same out from the place of business of said defendants or either of them without the same having been inspected and gauged by a United States Gauger and without having placed thereon the marks, stamps and brands as required by law, as charged in said count in the bill, and the jury will therefore find the defendant, N. Glenn Williams, not guilty of the offense charged in said count in said bill.

18. Before the jury can convict the defendant, N. Glenn Williams, of the offense charged in the third count in the bill of indictment, you must not only be satisfied beyond a reasonable doubt that said offense was in fact committed by some one, but you must be further satisfied beyond a reasonable doubt that it was either committed by the said N. Glenn Williams in person or by some other person with his knowledge and consent, and unless you shall be so satisfied, you will find the defendant, N. Glenn Williams, not guilty of the offense charged in the third count in said bill.

19. There is no evidence in this case that the defendant, D. E. Kennedy, was engaged with the defendants, The Old Nick Williams Company and N. Glenn Williams, in carrying on the business of rectifier of distilled spirits, having paid the special tax as such rectifiers as required by law, as charged in the third count in the bill of indictment, and the jury will (28) therefore acquit the said D. E. Kennedy of the offense charged in said count in said bill.

20. There is no evidence in this case that the defendant, D. E. Kennedy, drew off from the rectifier or cask of distilled spirits rectified by The Old Nick Williams Company, N. Glenn Williams and himself, as charged in the third count in the bill of indictment, and sent the same out from the place of business of said defendants or either of them without the same having been inspected and gauged by a United States Gauger and without having placed thereon the marks, stamps and brands as required by law, as charged in said count, in the bill and the jury will therefore find the defendant, D. E. Kennedy, not guilty of the offense charged in said count in said bill.

21. Before the jury can convict the defendant, D. E. Kennedy, of the offense charged in the third count in the bill of indictment, you must not only be satisfied beyond a reasonable doubt that said offense was in fact committed by some one, but you must be further satisfied beyond a reasonable doubt that it was either committed by the said D. E. Kennedy in person or by some other person with his knowledge and consent, and unless you shall be so satisfied, you will find the defendant, D. E. Kennedy, not guilty of the offense charged in the third count in said bill.

22. Upon all the evidence in this case the court charges the jury to find the defendant, The Old Nick Williams Company, not guilty of the offense charged in the third count in the said bill of indictment.

23. Before you can convict The Old Nick Williams Company of the offense charged in the third count in the bill of indictment, the jury must be satisfied beyond a reasonable doubt, not only that the acts there charged were committed by some one, but that they were done with the knowledge and consent of some officer or authorized agent of The Old Nick Williams (29) Company, and unless the jury shall so find beyond a reasonable doubt, they will acquit the said defendant of the offense charged in the third count in said bill.

24. There is no evidence in this case that the defendant, N. Glenn Williams, was engaged with The Old Nick Williams Company and D. E. Kennedy in carrying on the business of rectifiers of distilled spirits in the name of The Old Nick Williams Company, as charged in the foutrh count in the bill of indictment and the jury will therefore acquit the said N. Glenn Williams of the offense charged in said count in said bill.

25. There is no evidence in this case that the defendant, D. E. Kennedy, was engaged with The Old Nick Williams Company and N. Glenn Williams in carrying on the business of rectifiers of distilled spirits in the name of The Old Nick Williams Company as charged in the fourth count in the bill of indictment and the jury will therefore acquit the said D. E. Kennedy of the offense charged in said count in said bill.

26. There is no evidence in this case that the defendant, N. Glenn Williams, received into the place of business of The Old Nick Williams Company, for the purpose of rectifying the same from A. Dinkins at Conrads, N. C., one cask of distilled spirits and neglected, failed or refused to make the entries thereof in the book provided for that purpose, as charged in the fourth count in said bill of indictment, and the jury will therefore find the said N. Glenn Williams not guilty of the offense charged in the said fourth count in said bill.

27. There is no evidence in this case that the defendant, D. E. Kennedy, received into the place of business of The Old Nick Williams Company for the purpose of rectifying the same, from A. Dinkins at Conrads, N. C., one cask of distilled spirits and neglected, failed or refused to make the entries thereof in the book provided for that purpose, as charged in the fourth count in the said bill of indictment, and the jury will (30) therefore find the said D. E. Kennedy not guilty of the offense charged in the said fourth count in said bill.

28. Before the jury can convict the defendant, N. Glenn Williams, of the offense charged in the fourth count in the bill of indictment, you must not only be satisfied beyond a reasonable doubt that said offense was in fact committed by some one, but you must be further satisfied that it was either committed by the said N. Glenn Williams, in person, or by some other person with his knowledge and consent; and unless you shall be so satisfied you will find the defendant, N. Glenn Williams, not guilty of the offense charged in the fourth count in said bill.

29. Before the jury can convict the defendant, D. E. Kennedy, of the offense charged in the fourth count in the bill of indictment, you must not only be satisfied beyond a reasonable doubt that said offense was in fact committed by some one, but you must be further satisfied that it was either committed by the said D. E. Kennedy, in person, or by some other person with his knowledge and consent; and unless you shall be so satisfied you will find the defendant, D. E. Kennedy, not guilty of the offense charged in the fourth count in said bill.

30. Upon all the evidence in this case the court charges the jury to find the defendant, The Old Nick Williams Company, not guilty of the offense charged in the fourth count in the said bill of indictment.

31. Before you can convict The Old Nick Williams Company of the offense charged in the fourth count in the bill of indictment, the jury must be satisfied beyond a reasonable doubt, not only that the acts there charged were committed by some one, but that they were done with the knowledge and consent of some officer or authorized agent of The Old Nick Williams Company, and unless the jury shall so find beyond a rea-
(31) sonable doubt, they will acquit the said defendant of the offense charged in the second count in said bill.

32. There is no evidence in this case that the defendant, N. Glenn Williams, was engaged with The Old Nick Williams Company and D. E. Kennedy in carrying on the business of rectifiers of distilled spirits in the name of The Old Nick Williams Company, as charged in the fifth count in the bill of indictment, and the jury will therefore acquit the said N. Glenn Williams of the offense charged in said count in said bill.

33. There is no evidence in this case that the defendant, D. E. Kennedy, was engaged with The Old Nick Williams

Company and N. Glenn Williams in carrying on the business of rectifiers of distilled spirits in the name of The Old Nick Williams Company, as charged in the fifth count in the bill of indictment, and the jury will therefore acquit the said D. E. Kennedy of the offense charged in said count in said bill.

34. There is no evidence in this case that the defendant, N. Glenn Williams, was required on or before the 10th day of the month to make in a form prescribed by the Commissioner of Internal Revenue a return to the Collector of the Fifth Collection District of North Carolina, showing the quantity of spirits received for rectification by The Old Nick Williams Company, from whom received, etc., as charged in the fifth count in the bill of indictment, and the jury will therefore find the defendant N. Glenn Williams not guilty of the offense charged in said count in said bill.

35. There is no evidence in this case that the defendant, D. E. Kennedy, was required on or before the 10th day of the month to make in a form prescribed by the Commissioner of Internal Revenue a return to the Collector of the Fifth Collection District of North Carolina, showing the quantity of spirits received for rectification by The Old Nick Williams Company, from whom received, etc., as charged in the fifth count (32) in the bill of indictment, and the jury will therefore find the defendant, D. E. Kennedy, not guilty of the offense charged in said count in said bill.

36. Before the jury can convict the defendant, N. Glenn Williams of the offense charged in the fifth count in the bill of indictment, they must be satisfied beyond a reasonable doubt (1) that the said defendant, together with The Old Nick Williams Company and D. E. Kennedy, was engaged in carrying on the business of rectifiers, of distilled spirits in the name of the Old Nick Williams Company; (2) that the said N. Glenn Williams, as one of the parties so engaged, rectified or caused to be rectified, during the month of August, 1903, ten barrels of distilled spirits, withdrew the same from rectification, and wilfully, knowingly and designedly failed, neglected and refused to make returns thereof to the collector as required by law; and unless the jury shall be so satisfied, they will find the said N. Glenn Williams not guilty of the offense charged in the fifth count in the bill.

37. Before the jury can convict the defendant, D. E. Kennedy, of the offense charged in the fifth count in the bill of indictment, they must be satisfied beyond a reasonable doubt

(1) that the said defendant, together with The Old Nick Williams Company and N. Glenn Williams, was engaged in carrying on the business of rectifiers of distilled spirits in the name of the Old Nick Williams Company; (2) that the said D. E. Kennedy, as one of the parties so engaged, rectified or caused to be rectified during the month of August, 1903, ten barrels of distilled spirits, withdrew the same from rectification, and wilfully, knowingly and designedly failed, neglected and refused to make returns thereof to the collector as required by law; and unless the jury shall be so satisfied, they will find the said D. E. Kennedy not guilty of the offense charged in the fifth count in the bill.

(33) 38. There is no evidence in this case that The Old Nick Williams Company failed, neglected or refused to make return to the Collector of the Fifth Collection District of North Carolina, as charged the fifth count in the bill of indictment, and the jury will therefore find the Old Nick Williams Company not guilty of the offense so charged in said count of said bill.

39. There is no evidence in this case that the defendant, N. Glenn Williams, was engaged with The Old Nick Williams Company and D. E. Kennedy in carrying on the business of rectifiers of distilled spirits in the name of The Old Nick Williams Company, as charged in the sixth count in the bill of indictment, and the jury will therefore acquit the said N. Glenn Williams of the offense charged in said count in said bill.

40. There is no evidence in this case that the defendant, D. E. Kennedy, was engaged with The Old Nick Williams Company and N. Glenn Williams, in carrying on the business of rectifiers of distilled spirits in the name of The Old Nick Williams Company, as charged in the sixth count in the bill of indictment, and the jury will therefore acquit the said D. E. Kennedy of the offense charged in said count in said bill.

41. There is no evidence in this case that the defendant, N. Glenn Williams, was required, on or before the 10th day of the month, to make in a form prescribed by the Commissioner of Internal Revenue, a return to the Collector of the Fifth Collection District of North Carolina, showing the quantity of spirits received for rectification by The Old Nick Williams Company, from whom received, etc., as charged in the sixth count in the bill of indictment, and the jury will therefore find the defendant, N. Glenn Williams, not guilty of the offense charged in said count in said bill.

42. There is no evidence in this case that the defendant, D. E. Kennedy, was required on or before the 10th day of the (34) month to make in a form prescribed by the Commissioner of Internal Revenue a return to the Collector of the Fifth Collection District of North Carolina, showing the quantity of spirits received for rectification by The Old Nick Williams Company, from whom received, etc., as charged in the sixth count in the bill of indictment, and the jury will therefore find the defendant, D. E. Kennedy, not guilty of the offense charged in said count in said bill.

43. Before the jury can convice the defendant, N. Glenn Williams, of the offense charged in the sixth count in the bill of indictment, they must be satisfied beyond a reasonable doubt (1) that the said defendant, together with the Old Nick Williams Company and D. E. Kennedy, was engaged in carrying on the business of rectifiers of distilled spirits in the name of the Old Nick Williams Company; (2) that the said N. Glenn Williams as one of the parties so engaged, rectified or caused to be rectified, during the month of September, 1903, ten barrels of distilled spirits, withdrew the same from rectification, and wilfully, knowingly and designedly failed, neglected and refused to make returns thereof to the collector as required by law; and unless the jury shall be so satisfied, they will find the said N. Glenn Williams not guilty of the offense charged in the sixth count in the bill.

44. Before the jury can convict the defendant, D. E. Kennedy, of the offense charged in the sixth count in the bill of indictment, they must be satisfied beyond a reasonable doubt (1) that the said defendant, together with The Old Nick Williams Company and N. Glenn Williams, was engaged in carrying on the business of rectifiers of distilled spirits in the name of the Old Nick Williams Company; (2) that the said D. E. Kennedy, as one of the parties so engaged, rectified or caused to be rectified, during the month of September, 1903, ten barrels of distilled spirits, withdrew the same from rectification, and wilfully, knowingly and designedly failed, neglected and (35) refused to make returns thereof to the collector as required by law; and unless the jury shall be so satisfied, they will find the said D. E. Kennedy not guilty of the offense charged in the sixth count in the bill.

45. There is no evidence in this case that The Old Nick Williams Company failed, neglected or refused to make the return to the Collector of the Fifth Collection District of North

Carolina, as charged in the sixth count in the bill of indictment, and the jury will therefore find The Old Nick Williams Company not guilty of the offense so charged in said count of said bill..

46. There is no evidence in this case that the defendant, N. Glenn Williams, was engaged with The Old Nick Williams Company and D. E. Kennedy in carrying on the business of rectifiers of distilled spirits in the name of The Old Nick Williams Company, as charged in the seventh count in the bill of indictment, and the jury will therefore acquit the said N. Glenn Williams of the offense charged in said count in said bill.

47. There is no evidence in this case that the defendant, D. E. Kennedy, was engaged with The Old Nick Williams Company and N. Glenn Williams, in carrying on the business of rectifiers of distilled spirits in the name of The Old Nick Williams Company, as charged in the seventh count in the bill of indictment, and the jury will therefore acquit the said D. E. Kennedy of the offense charged in said count in said bill.

48. There is no evidence in this case that the defendant, N. Glenn Williams, was required, on or before the 10th day of the month, to make in a form prescribed by the Commissioner of Internal Revenue a return to the Collector of the Fifth Collection District of North Carolina, showing the quantity of spirits received for rectification by The Old Nick Williams Company, from whom received, etc., as charged in the seventh (36) count in the bill of indictment, and the jury will therefore find the defendant, N. Glenn Williams, not guilty of the offense charged in said count in said bill.

49. There is no evidence in this case that the defendant, D. E. Kennedy, was required, on or before the 10th day of the month, to make in a form prescribed by the Commissioner of Internal Revenue a return to the Collector of the Fifth Collection District of North Carolina, showing the quantity of spirits received for rectification by The Old Nick Williams Company, from whom received, etc., as charged in the seventh count in the bill of indictment, and the jury will therefore find the defendant D. E. Kennedy not guilty of the offense charged in said count in said bill.

50. Before the jury can convict the defendant, N. Glenn Williams, of the offense charged in the seventh count in the bill of indictment, they must be satisfied beyond a reasonable doubt (1) that the said defendant, together with The Old Nick Williams Company and D. E. Kennedy, was engaged in carry-

ing on the business of rectifiers of distilled spirits in the name of the Old Nick Williams Company; (2) that the said N. Glenn Williams, as one of the parties so engaged, rectified or caused to be rectified during the month of October, 1903, ten barrels of distilled spirits, withdrew the same from rectification, and wilfully, knowingly and designedly failed, neglected and refused to make returns thereof to the collector as required by law; and unless the jury shall be so satisfied, they will find the said N. Glenn Williams not guilty of the offense charged in the seventh count in the bill.

51. Before the jury can convict the defendant, D. E. Kennedy, of the offense charged in the seventh count in the bill of indictment, they must be satisfied beyond a reasonable doubt (1) that the said defendant, together with The Old Nick Williams Company and N. Glenn Williams, was engaged in carry-
(37) ing on the business of rectifiers of distilled spirits in the name of The Old Nick Williams Company; (2) that the said D. E. Kennedy, as one of the parties so engaged, rectified or caused to be rectified, during the month of October, 1903, ten barrels of distilled spirits, withdrew the same from rectification, and wilfully, knowingly and designedly failed, neglected and refused to make returns thereof to the collector as required by law; and unless the jury shall be so satisfied, they will find the said D. E. Kennedy not guilty of the offense charged in the seventh count in the bill.

52. There is no evidence in this case that The Old Nick Williams Company failed, neglected or refused to make the return to the Collector of the Fifth Collection District of North Carolina, as charged in the seventh count in the bill of indictment, and the jury will therefore find the Old Nick Williams Company not guilty of the offense so charged in said count in said bill.

53. There is no evidence adduced in the case that N. Glenn Williams, with The Old Nick Williams Company and D. E. Kennedy, was engaged in or carried on the business of rectifiers of distilled spirits during the month of August, 1903, or that he did in such name rectify distilled spirits or withdraw the same from rectification, or fail, neglect and refuse to make return thereof to the Collector of the Fifth Collection District of North Carolina, as charged in the fifth count of said bill of indictment; therefore the jury are directed to return a verdict of not guilty as to said N. Glenn Williams upon the fifth count in said bill of indictment.

54. There is no evidence adduced in the case that D. E. Kennedy, with The Old Nick Williams Company and N. Glenn Williams, was engaged in or carried on the business of rectifiers of distilled spirits during the month of August, 1903, or (38) that he did in such name rectify distilled spirits or withdraw the same from rectification, or fail, neglect and refuse to make return thereof to the Collector of the Fifth Collection District of North Carolina, as charged in the fifth count of said bill of indictment; therefore the jury are directed to return a verdict of not guilty as to said D. E. Kennedy upon the fifth count in said bill of idictment.

55. There is no evidence adduced in the case that N. Glenn Williams, with the Old Nick Williams Company and D. E. Kennedy, was engaged in or carried on the business of rectifiers of distilled spirits during the month of September, 1903, or that he did in such name rectify distilled spirits or withdraw the same from rectification, or fail, neglect and refuse to make return thereof to the Collector of the Fifth Collection District of North Carolina, as charged in the sixth count of said bill of indictment; therefore the jury are directed to return a verdict of not guilty as to the said N. Glenn Williams upon the sixth count in said bill of indictment.

56. There is no evidence adduced in the case that D. E. Kennedy, with The Old Nick Williams Company and N. Glenn Williams, was engaged in or carried on the business of rectifiers of distilled spirits during the month of September, 1903, or that he did in such name rectify distilled spirits or withdraw the same from rectification, or fail, neglect and refuse to make return thereof to the Collector of the Fifth Collection District of North Carolina, as charged in the sixth count of the said bill of indictment; therefore the jury are directed to return a verdict of not guilty as to said D. E. Kennedy upon the sixth count in said bill of indictment.

57. There is no evidence adduced in the case that N. Glenn Williams, with The Old Nick Williams Company and D. E. Kennedy, was engaged in or carried on the business of rectifiers of distilled spirits during the month of October, 1903, or (39) that he did in such name rectify distilled spirits or withdraw the same from rectification, or fail, neglect and refuse to make return thereof to the Collector of the Fifth Collection District of North Carolina; as charged in the seventh count of said bill of indictment; therefore the jury are directed to return a veridct of not guilty as to said N. Glenn Williams upon the seventh count in said bill of indictment.

58. There is no evidence adduced in the case that D. E. Kennedy, with The Old Nick Williams Company and N. Glenn Williams, was engaged in or carried on the business of rectifiers of distilled spirits during the month of October, 1903, or that he did in such name rectify distilled spirits or withdraw the same from rectification, or fail, neglect and refuse to make return thereof to the Collector of the Fifth Collection District of North Carolina, as charged in the seventh count of said bill of indictment; therefore the jury are directed to return a verdict of not guilty as to said D. E. Kennedy upon the seventh count in said bill of indictment.

59. There is no evidence adduced in this case that N. Glenn Williams was engaged in and carried on the business of a rectifier of distilled spirits in the name of The Old Nick Williams Company, as charged in the eighth count of said indictment, therefore the jury are directed to return a verdict of not guilty on said count as to him.

60. Only such persons, firms and corporations as have been, by reason of having paid the special tax required, duly authorized under the Act of Congress to do business as rectifiers of distilled spirits are required to keep the books and make the entries thereon as alleged in the eighth, ninth and eleventh counts in said indictment; therefore, there being no evidence produced in this case that N. Glenn Williams was so authorized to rectify distilled spirits, the jury cannot convict him of the offenses charged in the eighth count contained in the bill of indictment. They will, therefore, return a verdict of not guilty on said count as to him.

(40) 61. There is no evidence in this case that N. Glenn Williams, as a rectifier of distilled spirits, emptied for rectification or received from rectification any rectified cask or casks of distilled spirits, or that he unlawfully and wilfully, knowingly and designedly failed, neglected and refused to make the entries thereof in any book required by law to be kept by him, as charged in the eighth count contained in the indictment herein; therefore the jury are directed to return a verdict of not guilty as to him on said count.

62. There is no evidence adduced in this case that D. E. Kennedy was engaged in and carrying on the business of a rectifier of distilled spirits in the name of The Old Nick Williams Company, as charged in the eighth count of said bill of indictment; therefore the jury are directed to return a verdict of not guilty on said count as to him.

63. Only such persons, firms and corporations as have been duly authorized under the Act of Congress to do business as rectifiers of distilled spirits are required to keep the books and make the entries thereon as alleged in the eighth, ninth and eleventh counts in said indictment; therefore, there being no evidence produced in this case that D. E. Kennedy was so authorized to rectify distilled spirits, the jury cannot convict him of the offenses charged in the eighth count contained in the bill of indictment. They will, therefore, return a verdict of not guilty on said count as to him.

64. There is no evidence in this case that D. E. Kennedy, as a rectifier of distilled spirits, emptied for rectification or received from rectification any rectified cask or casks of distilled spirits or that he unlawfully and wilfully, knowingly and designedly failed, neglected and refused to make the entries thereof in any book required by law to be kept by him, as charged in the eighth count contained in the indictment herein; (41) therefore the jury are directed to return a verdict of not guilty as to him on said count.

65. The eighth count charges that The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy were rectifiers of distilled spirits; that is, in substance and effect, that they had paid the special tax required and were authorized by Act of Congress to rectify distilled spirits; that they engaged in the business of rectifying and did rectify distilled spirits, being so authorized, *in the name of The Old Nick Williams Company;* that they, as such rectifiers of distilled spirits did empty for rectification and receive from rectification ten casks of distilled spirits rectified by them, and that they then did unlawfully and wilfully, knowingly and designedly, fail, neglect and refuse to make the entries thereof on a book required by law to be kept by authorized rectifiers of distilled spirits. The law requires that the prosecution, before conviction of the citizen, shall prove the offense charged and that it was committed in the way and manner charged. In this case the prosecution must show to the jury beyond a reasonable doubt, before the jury is authorized to convict, not only that the offense charged has been committed, but that it was committed in the way and manner charged; that is, as to N. Glenn Williams the jury must find beyond a reasonable doubt that he was an authorized rectifier of distilled spirits, did empty for rectification and receive from rectification the distilled spirits as charged, and further, that he did unlawfully and wilfully, knowingly and designedly fail, neglect and refuse to make the entries thereof

on a book required by law to be kept by rectifiers for the purpose of making such entries thereon; and if the government has failed to so satisfy the jury beyond a reasonably doubt in any one of these respects, the jury will return a verdict of not guilty as to him.

66. The eighth count charges that The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy were rectifiers of distilled spirits; that is, in substance and effect, that (42) they were authorized by Act of Congress to rectify distilled spirits; that they engaged in the business of rectifying and did rectify distilled spirits, being so authorized, *in the name of The Old Nick Williams Company;* that they, as such rectifiers of distilled spirits did empty for rectification and receive from rectification ten casks of distilled spirits rectified by them, and that they then did unlawfully and wifully, knowingly and designedly fail, neglect and refuse to make the entries thereof on a book required by law to be kept by authorized rectifiers of distilled spirits. The law requires that the prosecution, before conviction of the citizen, shall prove the offense charged and that it was committed in the way and manner charged. In this case the prosecution must show to the jury beyond a reasonable doubt, before the jury is authorized to convict, not only that the offense charged has been committed, but that it was committed in the way and manner charged; that is, as to D. E. Kennedy the jury must find beyond a reasonable doubt that he was an authorized rectifier of distilled spirits, did empty for rectification and receive from rectification the distilled spirits as charged, and further, that he did unlawfully and wilfully knowingly and designedly fail, neglect and refuse to make the entries thereof on a book required by law to be kept by rectifiers for the purpose of making such entries thereon; and if the government has failed to so satisfy the jury beyond a reasonable doubt in any one of these respects, the jury will return a verdict of not guilty as to him.

67. The eighth count charges that The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy were rectifiers of distilled spirits; that is, in substance and effect, that they had paid the special tax required and were authorized by Act of Congress to rectify distilled spirits; that they engaged in the business of rectifying and did rectify distilled spirits, being so authorized, *in the name of The Old Nick Williams Company;* that they, as such rectifiers of distilled spirits, did (43) empty for rectification and receive from rectification ten casks of distilled spirits rectified by them, and that they

then did unlawfully and wilfully, knowingly and designedly fail, neglect and refuse to make the entries thereof on a book required by law to be kept by authorized rectifiers of distilled spirits. The law requires that the prosecution, before conviction of the citizen, shall prove the offense charged and that it was committed in the way and manner charged. In this case the prosecution must show to the jury beyond a reasonable doubt, before the jury is authorized to convict, not only that the offense charged has been committed, but that it was committed in the way and manner charged; that is, as to The Old Nick Williams Company the jury must find beyond a reasonable doubt that it was an authorized rectifier of distilled spirits, did empty for rectification and receive from rectification the distilled spirits as charged, and further, that it did unlawfully and wilfully, knowingly and designedly fail, neglect and refuse to make the entries thereof on a book required by law to be kept by rectifiers for the purpose of making such entries thereon; and if the government has failed to so satisfy the jury beyond a reasonable doubt in any one of these respects, the jury will return a verdict of not guilty as to it.

68. Upon all the evidence in this case the court instructs the jury to find the defendant, The Old Nick Williams Company, not guilty of the offense charged in the eighth count in the indictment.

69. There is no evidence in this case that the defendant, N. Glenn Williams, was engaged in and carried on the business of a rectifier of distilled spirits as charged in the ninth count of the bill of indictment; the jury will, therefore, return a verdict of not guilty as to him upon said ninth count.

70. There is no evidence in this case that the defendant, (44) N. Glenn Williams, The Old Nick Williams Company and D. E. Kennedy, were together or jointly engaged in and carrying on the business of rectifiers of distilled spirits in the name of The Old Nick Williams Company, as charged in the ninth count of the bill of indictment; the jury will, therefore, return a verdict of not guilty as to N. Glenn Williams upon said ninth count.

71. There is no evidence in this case that N. Glenn Williams did send out of spirits rectified by him one cask of distilled spirits to a person and place unknown to the grand jury, and did then and there unlawfully and wilfully, fail, neglect and refuse to enter upon a book, required by law to be kept by

him for that purpose, the name and residence of the person to whom the same was sent, with intent to defraud the United States of its tax; the jury will, therefore, return a verdict of not guilty as to him upon said ninth count in said bill.

72. There is no evidence in this case that the defendant, D. E. Kennedy, was engaged in and carried on the business of a rectifier of distilled spirits, as charged in the ninth count of the bill of indictment; the jury will, therefore, return a verdict of not guilty as to him upon said ninth count.

73. There is no evidence in this case that the defendant, D. E. Kennedy, The Old Nick Williams Company and N. Glenn Williams, were together or jointly engaged in and carrying on the business of rectifier of distilled spirits in the name of The Old Nick Williams Company, as charged in the ninth count of the bill of indictment; the jury will, therefore, return a verdict of not guilty as to D. E. Kennedy upon said ninth count.

74. There is no evidence in this case that D. E. Kennedy did send out of spirits rectified by him one cask of distilled spirits to a person and place unknown to the grand jury, and did then and there unlawfully and wilfully, fail, neglect and refuse to enter upon a book required by the law to be kept by (45) him for that purpose, the name and residence of the person to whom the same was sent, with intent to defraud the United States of its tax; the jury will, therefore, return a verdict of not guilty as to him upon said ninth count in said bill.

75. Only such persons, firms and corporations as have been duly authorized under the Act of Congress to do business as rectifiers of distilled spirits are required to keep the books and make the entries thereon as alleged in the eighth, ninth and eleventh counts in said indictment; therefore, there being no evidence produced in this case that N. Glenn Williams was so authorized to rectify distilled spirits, the jury cannot convict him of the offenses charged in the ninth count contained in the bill of indictment. They will, therefore, return a verdict of not guilty on said count as to him.

76. Only such persons, firms and corporations as have been duly authorized under the Act of Congress to do business as rectifiers of distilled spirits are required to keep the books and make the entries thereon as alleged in the eighth, ninth and

eleventh counts in said indictment; therefore, there being no evidence produced in this case that N. Glenn Williams was so authorized to rectify distilled spirits, the jury cannot convict him of the offenses charged in the ninth count contained in the bill of indictment. They will, therefore, return a verdict of not guilty on said count as to him.

77. The ninth count charges that The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy were rectifiers of distilled spirits; that is, in substance and effect, that they were authorized by Act of Congress to rectify distilled spirits; that they did engage in the business of rectifying and did rectify distilled spirits, being so authorized, *in the name of The Old Nick Williams Company;* that they, as such rectifiers of distilled spirits, did then and there, send out of the spirits so rectified by them, one cask of distilled spirits to a person and (46) place to the grand jurors unknown, and did then and there unlawfully and wilfully, fail, neglect and refuse to enter upon a book required to be kept by the law for the purpose, at the time they sent the same out, and the name and residence of the person to whom the same was so sent, with the intent to defraud the United States of its tax. The law demands of the prosecution in this case before conviction of the defendants, who are presumed by the law to be innocent until a jury has found them guilty, that it shall not only prove them guilty beyond a reasonable doubt but that it shall prove the offenses charged to have been committed in the way and manner as charged in the bill of indictment. Therefore in this case as to N. Glenn Williams, the jury must find and be satisfied beyond a reasonable doubt, from the evidence and nothing else, that he was an authorized or licensed rectifier, under the Act of Congress, of distilled spirits; that as such authorized rectifier of distilled spirits he was engaged in and doing business as such rectifier of distilled spirits; that he was not only such authorized rectifier of distilled spirits and engaged in and doing business as such rectifier, but was engaged in and doing the business of such rectifier of distilled spirits together and jointly with his co-defendants, The Old Nick Williams Company and D. E. Kennedy, and in the name of The Old Nick Williams Company. The jury must also be satisfied from the evidence and nothing else that he and his co-defendants did send out of the spirits rectified by them, as charged in the said ninth count, one cask of the same to a person and place to the grand jury unknown at the time they acted upon the bill of indictment and found and returned the same "a true bill;" and that he did unlawfully and wilfully, that is, knowingly and intending it,

fail, neglect and refuse to enter upon the book required by the law to be kept for that purpose, the name and residence of the person to whom the cask was sent; and the jury must be further fully satisfied beyond a reasonable doubt that all this was with the intent to defraud the United States of its tax upon said cask (47) of distilled spirits and if the government has failed to satisfy the jury beyond such reasonable doubt from the evidence and nothing else of any one or more or all of these things, they are directed to return a verdict of not guilty as to N. Glenn Williams upon the ninth count in the bill of indictment.

78. The ninth count charges that The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy were rectifiers of distilled spirits; that is in substance and effect that they were authorized by Act of Congress to rectify distilled spirits; that they did engage in the business of rectifying and did rectify distilled spirits, being so authorized, *in the name of The Old Nick Williams Company;* that they, as such rectifiers of distilled spirits, did then and there send out of the spirits so rectified by them, one cask of distilled spirits to a person and place to the grand jurors unknown, and did then and there unlawfully and wilfully fail, neglect and refuse to enter upon a book required to be kept by the law for that purpose, at the time they sent the same out, and the name and residence of the person to whom the same was sent, with the intent to defraud the United States of its tax. The law demands of the prosecution in this case before conviction of the defendants, who are presumed by the law to be innocent until a jury has found them guilty, that it shall not only prove the offenses charged to have been committed in the way and manner as charged in the bill of indictment. Therefore in this case as to D. E. Kennedy, the jury must find and be satisfied beyond a reasonable doubt, from the evidence and nothing else, that he was an authorized or licensed rectifier, under the Act of Congress, of distilled spirits; that as such authorized rectifier of distilled spirits he was engaged in and doing business as such rectifier of distilled spirits; that he was not only such authorized rectifier of distilled spirits and engaged in and doing business as such rectifier, but was engaged in and doing the business as such recti- (48) fier of distilled spirits together and jointly with his co-defendants, The Old Nick Williams Company and N. Glenn Williams, and in the name of the Old Nick Williams Company. The jury must also be satisfied from the evidence and nothing else that he and his co-defendants did send out of the spirits rectified by them, as charged in the said ninth count, one cask of the same to a person and place to the grand jury unknown at

the time they acted upon the bill of indictment and found and returned the same "a true bill;" and that he did unlawfully and wilfully, that is knowingly and intending it, fail, neglect and refuse to enter upon the book required by the law to be kept for that purpose, the name and residence of the person to whom the cask was sent; and the jury must be further fully satisfied beyond a reasonable doubt that all this was with the intent to defraud the United States of its tax upon said cask of distilled spirits and if the government has failed to satisfy the jury beyond such reasonable doubt from the evidence and nothing else of any one or more of all of these things, they are directed to return a verdict of not guilty as to D. E. Kennedy upon the ninth count in the bill of indictment.

79. Upon all the evidence in this case the court charges the jury that the defendant, The Old Nick Williams Company, is not guilty of the offenses charged in the ninth count contained in the bill of indictment; they will, therefore, return a verdict of not guilty as to The Old Nick Williams Company upon said ninth count.

(49) 80. There is no evidence in this case that N. Glenn Williams was engaged in and carried on the business of a rectifier of distilled spirits as charged in the tenth count of said bill of indictment; hence, the jury will return a verdict of not guilty on said count as to him.

81. There is no evidence that N. Glenn Williams was, as charged in the tenth count of the bill of indictment, engaged in and carried on the business of a rectifier of distilled spirits, and did unlawfully, wilfully and fraudulently use a certain cask having thereon a certain Internal Revenue Stamp,, to-wit: a rectifier's stamp, which said cask had theretofore contained distilled spirits inspected therein and contained therein at the time of affixing said stamp, by putting into said cask for the purpose of selling the same distilled spirits other than the spirits and of quality different from the spirits as previously inspected therein, with intent to defraud the United States of its tax; therefore the jury will return a verdict of not guilty as to him upon said count.

82. There is no evidence in this case that D. E. Kennedy was engaged in and carried on the business of a rectifier of distilled spirits as charged in the tenth count of said bill of indictment; hence, the jury will return a verdict of not guilty on said count as to him.

83. There is no evidence that D. E. Kennedy was, as charged in the tenth count of the bill of indictment, engaged in and carried on the business of a rectifier of distilled spirits, and did unlawfully, wilfully and fraudulently use a certain cask having thereon a certain Internal Revenue Stamp, to-wit: a rectifier's stamp, which said cask had theretofore contained distilled spirits inspected therein and contained therein at the time of affixing said stamp, by putting into said cask for the purpose of selling the same distilled spirits other than the spirits and of quality different from the spirits as previously inspected therein, with intent to defraud the United States of its (50) tax; therefore the jury will return a verdict of not guilty as to him upon said count.

84. Upon all the evidence in this case, the court instructs the jury to find the defendant, The Old Nick Williams Company, not guilty of the charge contained in the tenth count in the bill of indictment.

85. There is no evidence that N. Glenn Williams, as charged in the eleventh count in the bill of indictment, was engaged in and carried on the business of a rectifier of distilled spirits, hence the jury are instructed to return a verdict of not guilty as to him on said count.

86. There is no evidence that N. Glenn Williams, as charged in the eleventh count in the bill of indictment, was engaged in and carried on the business of a rectifier of distilled spirits in the name of *The Old Nick Williams Company;* therefore, the jury are directed to return a verdict of not guilty as to him on said count.

87. There is no evidence in this case that N. Glenn Williams received into his place of business as a rectifier for the purpose of rectifying the same, one cask of distilled spirits, and did unlawfully and wilfully fail, neglect and refuse to make the entries thereof upon the book required by law to be kept by rectifiers for that purpose.

88. There is no evidence that D. E. Kennedy, as charged in the eleventh count in the bill of indictment, was engaged in and carried on the business of a rectifier of distilled spirits, hence the jury are instructed to return a verdict of not guilty as to him on said count.

89. There is no evidence that D. E. Kennedy, as charged in the eleventh count in the bill of indictment, was engaged

in and carried on the business of a rectifier of distilled spirits (51) *in the name of The Old Nick Williams Company;* therefore the jury are directed to return a verdict of not guilty as to him on said count.

90. There is no evidence in this case that D. E. Kennedy received into his place of business as a rectifier for the purpose of rectifying the same, one cask of distilled spirits and did unlawfully and wilfully fail, neglect and refuse to make the entries thereof upon the book required by law to be kept by rectifiers for that purpose.

91. There is no evidence in this case that The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy did, as charged in the bill of indictment, engage in and carry on the business of rectifiers of distilled spirits; therefore the jury will return a verdict of not guilty as to all of said defendants.

92. Upon all the evidence adduced in the case the jury are directed to return a verdict of not guilty as to The Old Nick Williams Company, upon the eleventh count in the bill of indictment, as in no view of it is said company guilty.

93. Only such persons, firms and corporations as have paid the tax required under the Act of Congress to do business as rectifiers of distilled spirits are required by law to keep the books and make the entries thereon as alleged in the eleventh count in the bill of indictment; therefore, there being no evidence in this case that N. Glenn Williams was such rectifier of distilled spirits by reason of having paid such tax, the jury cannot convict him of the offense charged in the said eleventh count, but will return a verdict as to him of not guilty on the same.

94. There is no evidence in this case, if the offense charged in the eleventh count in the bill of indictment was committed at all, that it was committed with the knowledge and consent of the defendant, N. Glenn Williams, and the jury will (52) therefore acquit the said defendant of the offense charged in said eleventh count of said bill.

95. Before you can convict the defendant, N. Glenn Williams of the offense charged in the eleventh count of the bill of indictment, you must not only be satisfied beyond a reasonable doubt that said offense was in fact committed by some one, but you must be further satisfied beyond a reasonable doubt that it was either committed by N. Glenn Williams in person, or

by some other person with his nowledge and consent, and unless you shall so find you will find the said defendant not guilty of the offense charged in said eleventh count in the bill.

96. There is no evidence in this case, if the offense charged in the eleventh count in the bill of indictment was committed at all, that it was committed with the knowledge and consent of the defendant, D. E. Kennedy, and the jury will therefore acquit the said defendant of the offense charged in said eleventh count of said bill.

97. Before you can convict the defendant, D. E. Kennedy, of the offense charged in the eleventh count of the bill of indictment, you must not only be satisfied beyond a reasonable doubt that said offense was in fact committed by some one, but you must be further satisfied beyond a reasonable doubt that it was either committed by D. E. Kennedy in person, or by some other person with his knowledge and consent, and unless you shall so find, you will find the said defendant not guilty of the offense charged in said eleventh count in the bill.

(53) 98. The jury is instructed to consider the evidence of the test made at the distillery under the direction of Col. Chapman, during the trial of this case, only for the purpose of showing or tending to show the capacity of said distillery to produce distilled spirits from a given quantity of grain or material, as throwing light upon the question as to whether the defendants or either of them operated said distillery during the time referred to in the bill of indictment with the intent to defraud the government. And the jury is instructed in passing upon the question not to consider the evidence of the government witnesses tending to show that more than the authorized quantity of meal was used in producing the beer from which the test was made, as that fact, if proved, could not have any bearing whatever upon any charge contained in the bill of indictment, as there is no evidence in this case tending to show that the defendants or either of them were responsible for the operation of said distillery at or immediately before said test was made.

99. Unless the jury shall be satisfied beyond a reasonable doubt that the distillery which was used by Revenue Agent Chapman and others on the 2nd inst. for the purpose of testing its capacity, and which was then being run in the name of D. C. Foster, was not the property of the said Foster, but in reality the property of the defendants and operated by them, then the court charges the jury that they can only consider the

evidence of said test for the purpose of showing the number of gallons of spirits which might be distilled from a given quantity of material or beer as contained in the two fermenting tubs used in making said test, and they will not consider any evidence of the conditions and surroundings of said distillery at the time said test was made, which do not appear to have existed when the same was being operated in the name of D. E. Kennedy for the purpose of proving or tending to prove that said distillery was operated by the defendants for the purpose (54) of defrauding the government of the tax upon the spirits distilled thereat, as charged in the twelfth count of the bill of indictment. In other words, unless the said distillery was owned and being operated by the defendants at the time the test was made, the evidence of the government's witnesses tending to show that more than 101 bushels of grain was used in making the mash in the fermenting tubs used in making said test, cannot be considered by the jury in passing upon the guilt or innocence of the defendants in this case. Neither would the acts and declarations of the distiller and others engaged in operating said distillery at said time be competent evidence against the defendants in this case, unless the jury should be satisfied that said distillery was then being operated by the defendants and not by the said Foster.

100. But if the jury shall be satisfied that the said distillery was in reality the property of the defendants and being operated by them in the name of the said Foster, then the court charges the jury that Revenue Agent Chapman was not as a matter of law, in the absence of the defendants or without their consent, authorized to take possession of the said distillery for the purpose of actually operating the same to test its capacity in order that evidence of said test might be used upon the trial of this or any other indictment against these defendants, and the jury should not consider the evidence of the government's witnesses with reference to the result of said test, or even the fact that the test was made, in passing upon the guilt or innocence of the defendants in this case.

101. The court instructs the jury as a matter of law, that these defendants, or either of them, cannot be held responsible for the acts, conduct and declarations of those in charge of the operation of the distillery being run in the name of D. C. Foster at and before the test was made by Revenue Agent Chapman on the 2nd inst., as it is not denied that at and prior to (55) said time the defendants Williams and Kennedy were absent in attendance upon this court, and there is no evidence

in this case that the persons so in charge of said distillery were the agents of the defendants or either of them, or authorized by them to do or say the things testified to by the government's witnesses. Therefore the court charges the jury in passing upon the guilt or innocence of these defendants, not to consider the evidence of the acts, conduct and declarations of the person so in charge of said distillery at and before said test was made.

102. The evidence of the government's witnesses as to the result of the test made by them at the distillery on the 2nd inst. and of the acts, conduct and declarations of those engaged in operating said distillery at the time, if competent at all, can only be considered by the jury in passing upon the offense charged in the twelfth count in the bill of indictment, and the jury will not in any event consider it for any other purpose.

(56) 103. The defendants are presumed to be innocent of all the charges against them contained in the bill of indictment until they are proved guilty by evidence which satisfies you beyond a reasonable doubt of their guilt; and this presumption of innocence which the law raises in their behalf is to be regarded by the jury in this case as a matter of evidence to the benefit of which the defendants are entitled.

104. This presumption of innocence is evidence in favor of the defendants introduced by the law in their behalf and it continues in their favor until the end, unless overcome by such competent proof as satisfies the jury beyond a reasonable doubt of their guilt.

105. Unless, therefore, the presumption of the defendants' innocence which is evidence introduced by the law in their behalf in this case and which must be considered by the jury as evidence of their innocence, is overcome by competent proof establishing the defendants' guilt in that degree and to that extent which removes from the minds of the jury all reasonable doubt of their guilt, it will be the duty of the jury to return a verdict of not guilty.

106. In the first, ninth, tenth and twelfth counts in the bill of indictment, the defendants are charged with doing the acts therein alleged with intent to defraud the United States of its tax. This intent is a necessary ingredient and element of the crimes in the said counts. It is this intent to defraud the United States of its tax which makes the guilt of the defendants, and in the absence of such intent there is no violation of the Act of Congress prohibiting the doing of the things which

are charged in the said counts. This intent is the essence and essential and necessary element in the crimes charged in the said counts and denounced by law.

(57) 107. The jury cannot, therefore, presume that the defendants or any of them are guilty upon the first, ninth, tenth and twelfth counts, even should they find that they did the acts charged in the said counts. It is incumbent upon the government in this case to go further and to satisfy you fully and beyond reasonable doubt that they did those acts charged in the said counts with the wrongful intent to injure and defraud the United States of its tax as charged in the said counts.

108. There is no presumption of the guilt of the defendants arising from the fact that they did the acts charged against them in the bill of indictment. If the jury shall find that the defendants did do such acts charged in the first, ninth, tenth and twelfth counts and in the way and manner charged therein, they will not presume from the doing of such acts that the defendants are guilty, for it is not the doing of such acts that constitutes guilt, but it is the doing of the acts charged with the wrongful intent to defraud the United States of its tax; and unless such intent exists and the jury should be so satisfied beyond all reasonable doubt from the evidence alone that such intent existed, they cannot convict the defendants or either of them upon said counts.

109. If the acts charged in the first, ninth, tenth and twelfth counts were committed by the defendants for any other purpose or with any other intent than to defraud the United States of its tax, then the defendants are not guilty as charged in the said counts, and the jury will return a verdict of not guilty on the said counts.

110. The first count in the bill of indictment charges the defendants, The Old Nick Williams Company, a corporation, N. Glenn Williams, and D. E. Kennedy, with having power and authority to engage in and carry on the business of a rectifier of distilled spirits in effect & in substance, and that they (58) did, being then and there engaged in and carrying on the business of a rectifier of distilled spirits, engage in and carry on the same with intent to defraud the United States of the tax upon the spirits rectified by them. The burden is upon the government to show all of the material elements of the crimes charged against the defendants, and the government must show this to the satisfaction of the jury and beyond a rea-

sonable doubt. It must show, first, that they did engage in and carry on the business of rectifiers of distilled spirits with power and authority derived from the government to do so. Second, it must so satisfy the jury that they so engaged in and carried on the business of rectifiers of distilled spirits with the wrongful intent to defraud the United States of the tax upon the spirits rectified by them. It is not the mere engaging in or carrying on the business of a rectifier which makes the defendants guilty. It is the wrongful intent to defraud the United States of its tax which makes the guilt, and if the jury should find from the evidence and beyond a reasonable doubt that the defendants did have power and authority to engage in and carry on the business of a rectifier of distilled spirits and that they did engage in and carry on such business, but they should fail to be satisfied from the evidence beyond a reasonable doubt that the defendants had such wrongful and fraudulent intent in so engaging in and carrying on the said business, the jury would return a verdict of not guilty against them on said count.

111. The ninth count of said bill of indictment charges the defendants with being engaged in and carrying on the business of rectifiers of distilled spirits; that they did, being so engaged in and carrying on the business of rectifiers of distilled spirits, send out of the spirits rectified by them one cask of distilled spirits to a person and place to the grand jurors, who found the bill, unknown; and that they did unlawfully and wilfully fail, neglect and refuse to enter upon a certain book required by the Act of Congress to be kept by them as such rec-
(59) tifiers the name and residence of the person to whom the same was so sent by them; and further, that this was done with intent to defraud the United States of its tax. The government in this case must satisfy you by the evidence alone and beyond a reasonable doubt that the defendants were duly authorized by the government under the Act of Congress to engage in and carry on the business of rectifiers of distilled spirits; that they did engage in and carry on such business; that they did send out of the spirits rectified by them one cask of distilled spirits to a person and a place to the grand jurors unknown; and that they did then and there neglect and refuse to enter upon said book the name and residence of the person to whom the same was sent. Not only must the government satisfy you of all these things from the evidence alone and beyond a reasonable doubt, but it must also so satisfy you that these things were done by the defendants with the wrongful and fraudulent intent to deprive the United States of its tax upon the said cask of distilled spirits, and if it has failed to so

fully satisfy you, you will return a verdict of not guilty upon said count.

112. And the facts, if you shall be satisfied beyond a reasonable doubt that they are true, that the defendants did neglect and refuse to enter upon said book the name and residence of the person to whom said cask of distilled spirits was sent, raises no presumption of guilt on the part of the defendants. Even after finding the facts that the defendants were engaged in and carrying on the business of rectifiers of distilled spirits, and that they did send out a cask of said spirits so rectified by them to a person and place to the jurors unknown, and that they did then and there neglect and refuse to enter upon said book the name and residence of the person to whom the same was sent, raises no presumption of the guilt of the defendants or of either of them, but it would be still incumbent upon the government (60) in this case to satisfy you beyond a reasonable doubt that the defendants did all these things with the wrongful and fraudulent intent to deprive the United States of the tax due to it upon said distilled spirits, before you could return a verdict of guilty on the ninth count in the bill.

113. The tenth count in the said bill of indictment charges the defendants with having power and authority to engage in and carry on the business of a rectifier of distilled spirits, and that they did engage in and carry on the business of rectifiers of distilled spirits; that they did unlawfully, wilfully and fraudulently use a certain cask having thereon a certain revenue stamp, to-wit, a rectifier's stamp, which said cask had theretofore contained distilled spirits inspected therein and contained therein at the time of affixing said stamp, and that they did put into said cask for the purpose of selling the same, distilled spirits of a quality different from the spirits so previously inspected therein, and that this was done with intent on their part to defraud the United States of its tax upon said distilled spirits. The facts, if such should be found by the jury to have existed, that the defendants did have power and authority to engage in and carry on the business of rectifiers of distilled spirits, and that they did engage in and carry on such business, that they did use such cask having thereon such stamp, that the said cask had theretofore contained distilled spirits inspected therein and contained therein at the time of affixing said stamp, and that they put into such cask for the purpose of selling the same distilled spirits other than the spirits and of a quality different from the spirits so previously inspected therein, raises no presumption of guilt whatever against the defend-

ants. It is still incumbent upon the prosecution in this case and it must satisfy you from the evidence alone and beyond a reasonable doubt that all these things were done by the defendants with intent to defraud the United States of its tax; and although the jury may be satisfied by the evidence alone of all these things other than this fraudulent intent denounced by (61) the statute, if the prosecution has not satisfied the jury beyond a reasonable doubt that the defendants did these things with such wrongful and fraudulent intent thus to deprive the United States of its tax upon said distilled spirits, they will return a verdict of not guilty on this count.

114. The twelfth count charges that the defendants did engage in and carry on the business of a distiller of spirituous liquors with intent to defraud the United States of the tax upon the spirits distilled by them. It is incumbent upon the prosecution to satisfy you beyond a reasonable doubt from the evidence alone that they did have such power and authority to engage in and carry on the business of a distiller of spirituous liquors *in* as alleged, and that they did engage in and carry on such business with the intent to defraud the United States of the tax due to it upon the spirits distilled by them. There is no presumption of the guilt of the defendants or either of them arising from the facts, if you should find them to be true, that they were so *authorized to and did* [words in italic marked out in copy] carry on and engage in said business. It is still incumbent upon the prosecution not only to prove that the defendants did these things but that they were done with the wrongful and fraudulent intent to deprive the United States of the tax upon the spirits so distilled by them, and if the jury are not satisfied from the evidence alone and beyond a reasonable doubt that such wrongful and fraudulent intent existed at the time they were so engaged in and carried on the said business, the jury will return a verdict of not guilty on this count.

115. If the jury shall not have removed from their minds all reasonable doubt of the defendants' wrongful and unlawful (62) intent thus to defraud the United States of its tax as alleged in counts one, nine, ten and twelve in the bill of indictment, after deliberately considering all the evidence in the case on both sides, including the presumption of the innocence of the defendants, then it will be the duty of the jury to return a verdict of not guilty upon such counts.

116. "In the trial of cases like the one at bar, the general good character of the defendants ought to have great weight

with the jury. In all instances where the facts are doubtful or admit of doubtful interpretation, and in particular where cases of criminal knowledge or intention is material to be proved and in resolving any doubt which the jury may have from the evidence as to the criminal knowledge or intention of the defendants, the uncontradicted proof of their former good reputation for honesty and integrity should bear great weight and be allowed to settle a doubt in the defendants favor. Good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character would alone create a reasonable doubt, although without the other evidence it would be convincing."

117. If the jury can in this case reconcile the evidence with any reasonable hypothesis consistent with the innocence of the accused, it is their duty to do so, and in that case the verdict should be not guilty.

118. It is an established rule of law that an act and evil intent must be combined to constitute in law a crime. Therefore, in order for the jury to find the defendants guilty upon counts one, nine, ten and twelve, they must be satisfied by the proof beyond all reasonable doubt that what they did was accomplished on their part with an evil intent; that is, a fraudulent and wrongful intent to deprive the United States of its tax.

(63) 119. It is an established rule of law that an act and evil intent must be combined to constitute in law a crime. Therefore, in order for the jury to find the defendants or either of them guilty in this case, they must be satisfied with the proof beyond all reasonable doubt that what they did was accomplished on their part with an evil intent.

120. If the jury shall not be fully satisfied; that is, beyond a reasonable doubt, upon the whole evidence, that the defendants did the acts charged in the bill of indictment with the unlawful intent denounced by the statute, they will return a verdict of not guilty upon counts one, nine, ten and twelve.

121. "Proof beyond a reasonable doubt is such as will produce an abiding conviction in the mind to a moral certainty that the fact exists that is claimed to exist so that you feel certain it exists. A balance of proof is not sufficient. A juror in a criminal case ought not to condemn unless the evidence excludes from his mind all reasonable doubt; unless he be so

convinced by the evidence, no matter what the class of the evidence of the defendants' guilt, that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to his own dearest personal interests."

122. If the jury are left in doubt upon the whole evidence of the guilt of the defendants, they will return a verdict of not guilty.

123. The evidence in this case discloses the fact that at the time referred to in the bill of indictment the defendant, The Old Nick Williams Company, was engaged in and carrying on the business of a retail liquor dealer and had paid the government the special tax imposed by law upon said business. This (64) being true, the court charges the jury that The Old Nick Williams Company as such retail liquor dealer, had the legal right to purchase wholesale packages of spirits duly stamped and place the same in its retail establishment without making entries of such purchase upon the wholesale or rectifying books which the government required the said company to keep in connection with its business as a wholesale liquor dealer or rectifier of distilled spirits. The Old Nick Williams Company also had the right as such retail liquor dealer to draw off from such wholesale packages so purchased by it and placed in its retail establishment retail packages or packages of less than five gallons and to sell the same without entering such transactions upon any books required by law to be kept by it as a wholesale liquor dealer or rectifier of distilled spirits. And unless the jury shall be satisfied beyond a reasonable doubt from the evidence that the defendants did not draw off the retail packages of spirits which were shipped by The Old Nick Williams Company from wholesale packages purchased by it as a retail liquor dealer, but in fact drew off the said retail packages or some of them from its rectified or wholesale packages which had been purchased by it for or charged by it to retail or obtained them from non-tax paid packages otherwise acquired, then the jury could not convict the defendants of any of the offenses charged in the bill of indictment, unless the government has satisfied you beyond a reasonable doubt of their guilt upon evidence other than that of the mere sales of retail packages of spirits in quantities in excess of the amounts which appear upon the wholesale or rectifying books of The Old Nick Williams Company to have been disposed of by it.

124. In other words, before the government can convict the defendants or either of them of any of the offenses charged

in the bill of indictment upon the evidence that The Old Nick Williams Company had from time to time sold large quantities of retail packages of spirits in excess of the amounts which (65) it had theretofore caused to be charged off to retail and upon its wholesale or rectifying books required by the government to be kept by it, the jury must be satisfied beyond a reasonable doubt that the retail packages so sold were in fact not liquors purchased by the said company in its capacity as a retail liquor dealer, in duly stamped wholesale packages, but that the said retail packages so sold and shipped had been drawn off from its wholesale or rectified packages which had not been charged off to retail, or were packages otherwise acquired contrary to law and upon which the tax had not been paid.

125. The court has permitted the prosecution to introduce evidence tending to show amounts of spirits sold and shipped by the defendant, The Old Nick Williams Company. This evidence by itself is not sufficient to justify the jury in returning a verdict against the defendants or any of them. If the jury should find from this evidence that the defendant, The Old Nick Williams Company, sold or disposed of more distilled and rectified spiritous liquors than the evidence shows it bought or otherwise obtained, this will not justify you in returning a verdict of guilty.

126. It is incumbent upon the government to show the guilt of the defendants from the evidence alone beyond a reasonable doubt, and the fact, if it should be found to be true, that The Old Nick Williams Company, sold more whiskey or other spirits than it is shown by the evidence to have bought, is not sufficient to, permit the jury to find the defendants or any of them guilty.

127. The defendants are not required to show how, where, from whom or under what circumstances they obtained the spirits sold by them, but the government must show you, if it becomes material in this case, to your satisfaction beyond a rea- (66) sonable doubt, that they obtained them in violation of the law.

128. The defendants Kennedy and The Old Nick Williams Company can wait in this case until the government has shown guilt; they are not guilty of a violation of the law simply because they sold more spiritnous liquors than the evidence showed they distillery bought, Kennedy being an authorized distiller, and the company being rectifiers, wholesalers and retailers of the same; nor are they called upon or required to explain how they became possessed of such spiritnous liquors.

130. The defendant, The Old Nick Williams Company, was authorized by the government to deal in spirituous liquors as a rectifier, wholesaler and retailer of the same; and the defendant D. E. Kennedy, was authorized by the government to deal as a distiller in the products of his distillery. It is not sufficient evidence to warrant a conviction of them or any of them that they sold and disposed of such spirits as such distillers, rectifiers, wholesalers and retailers in large quantities.

131. The fact, if true, that they did, as rectifiers, wholesalers and retailers of distilled, rectified and compounded spirits, sell the same, does not make them or any of them guilty of the charges contained in the bill of indictment.

132. The fact, if true, that they, the defendants, did sell distilled spirits in a large quantity, does not put any burden upon them to explain or in any way account for their possession thereof.

133. There is no evidence in this case that The Old Nick Williams Company was authorized or empowered, under the Act of Congress, to engage in or carry on the business of a distiller of spirituous liquors; therefore the jury are directed to return a verdict as to the said The Old Nick Williams Com-
(67) pany, on the twelfth count of the bill of indictment, of not guilty.

134. There is no evidence in the case that The Old Nick Williams Company engaged in or carried on the business of distiller of spirituous liquors as alleged in the twelfth count in the bill of indictment; the jury will, therefore, return a verdict of not guilty as to the said company on said twelfth count.

135. There is no evidence that The Old Nick Williams Company engaged in or carried on the business of distiller of spirituous liquors with intent to defraud the United States of the tax upon spirits distilled by it or by it and the other defendants, as charged in the twelfth count in the bill; therefore the jury will return a verdict of not guilty as to said company, on said count.

136. There is no evidence in the case that The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy engaged in and carried on the business of a distiller of spirituous liquors as charged in the twelfth count of the bill of indictment; therefore the jury will return a verdict of not guilty on said count as to said company.

137. In no view of the evidence is The Old Nick Williams Company guilty of the charges contained in the twelfth count of the bill of indictment; therefore, the jury are directed to return a verdict of not guilty upon said count as to it.

138. There is no evidence in the case that N. Glenn Williams was authorized or empowered, under the Act of Congress, to engage in or carry on the business of a distiller of spirituous liquors; therefore the jury are directed to return a verdict as to the said N. Glenn Williams, on the twelfth count of the bill of indictment, of not guilty.

(68) 139. There is no evidence in the case that N. Glenn Williams engaged in or carried on the business of distiller of spirituous liquors as alleged in the twelfth count in the bill of indictment; the jury will, therefore, return a verdict of not-guilty as to the said N. Glenn Williams on said twelfth count.

140. There is no evidence that N. Glenn Williams engaged in or carried on the business of distiller of spirituous liquors with intent to defraud the United States of the tax upon spirits distilled by him or by him and the other defendants, as charged in the twelfth count in the bill; therefore the jury will return a verdict of not guilty as to the said N. Glenn Williams on said count.

141. There is no evidence in the case that The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy engaged in and carried on the business of a distiller of spirituous liquors as charged in the twelfth count of the bill of indictment; therefore the jury will return a verdict of not guilty on said count as to the said N. Glenn Williams.

142. In no view of the evidence is N. Glenn Williams guilty of the charges contained in the twelfth count of the bill of indictment; therefore, the jury are directed to return a verdict of not guilty upon said count as to him.

143. The indictment in the twelfth count charges that the defendants, The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy, together engaged in and carried on the business of a distiller of spirituous liquors; that they did together unlawfully and wilfully engage in and carry on the same with intent to defraud the United States of its tax upon "the spirits so distilled by them." The government must show by the evidence beyond a reasonable doubt that they are

(69) guilty as charged in the bill before the jury can convict them or any of them; that is, it must show that they did together, jointly, engage in and carry on the business of a distiller, and that they did this with the common intent, joined in by all of them, to defraud the United States of its tax on spirits distilled by them; and if the government has failed in these respects or either of these respects, the jury will return a verdict of not guilty upon the twelfth count.

144. There is no evidence in the case that the defendant, D. E. Kennedy, together with his co-defendants or otherwise, engaged in and carried on the business of a distiller of spirituous liquors with intent to defraud the United States of its tax; therefore, the jury will return a verdict on the twelfth count as to him, of not guilty.

145. The facts that the defendant, Kennedy, made application to the collector for the privilege of engaging in the business of a distiller of spirituous liquors, that he obtained such privilege and did engage in and carry on such business, will not warrant the conclusion that he had the intent to defraud the United States of its tax upon spirituous liquors distilled by him. The government, in order to justify you in convicting him of a fraudulent intent to deprive it of its tax, must show some overt act on his part, or facts and circumstances from which you can infer his guilty intent, and such as will convince you beyond a reasonable doubt of his fraudulent purpose and design.

146. There is no evidence in this case that the defendant, Kennedy, engaged in or carried on the business of a distiller of spirituous liquors with the fradulent intent to deprive the United States of its tax.

147. The statute upon which the first count in the bill of (70) indictment is based, does not prescribe a punishment simply for the intent to defraud the United States of its tax, but for the act of engaging in the business of a rectifier of distilled spirits with that intent. The act and the fraudulent intent together constitute the offense.

148. The statute upon which the twelfth count in the bill of indictment is based does not prescribe a punishment simply for the intent to defraud the United States of the tax on spirits distilled, but for the act of engaging in and carrying on the business of a distiller with that intent. The act and fraudulent intent together constitute the offense.

149. The Acts of Congress, upon which the bill of indictment is based, have for their purpose the prevention of frauds against the United States which deprive it of its tax upon distilled spirits. The offenses created by these statutes, so far as the criminal law is concerned, can only exist when the acts prohibited or commanded to be done are not done or are done with an unlawful, wilful and fraudulent intent. Unless there is found in the mind of the person charged, at the time of doing the forbidden act or at the time of failure to do the act commanded to be done, a wrongful, wilful and fraudulent intent and purpose to violate the law, combined with such failure to do or with the doing of the act, no crime exists, and the jury should acquit.

150. Counts five, six, seven and eleven of the bill of indictment substantially charge the defendants with unlawfully and wilfully, knowingly and designedly failing and refusing to do the acts and things required by law as stated therein. The law in this case devolves upon the government the burden of satisfying you beyond a reasonable doubt that these things are true as charged in the bill. It is essential in this case that the jury, before they convict, become satisfied beyond a rea-
(71) sonable doubt that the defendants did wilfully, that is, knowingly and on purpose, designedly, that is, intending not to do the things required, fail, neglect and refuse to do the things required of them as stated in the bill; and the jury must return a verdict of not guilty unless they are satisfied from the evidence beyond a reasonable doubt that they did so knowingly, designedly and on purpose fail and refuse to do these things.

151. Counts two, three, four, eleven, fourteen and fifteen charge the defendants with doing the acts therein charged unlawfully and wilfully. The law casts upon the government the burden of showing you, from the evidence alone, beyond a reasonable doubt, that the defendants are guilty as charged in the bill. It must satisfy you from the evidence beyond a reasonable doubt that they did the acts charged, not only unlawfully, but that they did the same wilfully; that is, knowingly, designedly and on purpose. The *wilful* doing of the acts charged in said counts is, in this case, essential, and the jury cannot return a verdict of guilty against them or any of them unless they are satisfied beyond a reasonable doubt that said acts were done by them wilfully; that is, knowingly, designedly and on purpose. The guilty knowledge, the guilty purpose, the intent, and design not to do these things, are essential and necessary to conviction, and in the absence of such knowledge, purpose,

intent and design, the jury will return a verdict of not guilty upon these counts.

152. Count thirteen charges the defendants with having made a false statement to, or with giving a false notice to, the Collector of Internal Revenue, in that they stated that the name of every person interested and to be interested in the business of a distiller to be carried on at Williams, N. C., was D. E. Kennedy, when in truth and fact The Old Nick Williams Com-
(72) pany and N. Glenn Williams and other persons to the jurors unknown, owned and operated said business. The court charges you that there is no evidence in the case that The Old Nick Williams Company had any interest in or was to be interested in said business; therefore, the jury will return a verdict of not guilty upon said count as to said company.

153. Count thirteen charges the defendants with having made a false statement to or with giving a false notice to the Collector of Internal Revenue, in that they stated that the name of every person interested and to be interested in the business of a distiller to be carried on at Williams, N. C., was D. E. Kennedy, when in truth and fact The Old Nick Williams Company and N. Glenn Williams and other persons to the jurors unknown, owned and operated said business. The court charges you that there is no evidence in the case that N. Glenn Williams had any interest in or was to be interested in said business; therefore, the jury will return a verdict of not guilty upon said count as to the said N. Glenn Williams.

154. There is no evidence in the case that The Old Nick Williams Company ever made any statement or gave any notice whatever to the Collector of Internal Revenue as charged in the thirteenth count of the bill of indictment; therefore, the jury will return a verdict of not guilty as to it upon said count.

155. There is no evidence in the case that N. Glenn Williams ever made any statement or gave any notice whatever to the Collector of Internal Revenue as charged in the thirteenth count of the bill of indictment; therefore, the jury will return a verdict of not guilty as to him upon said count.

156. All the evidence shows that the only statement made to or notice given to, the Collector of Internal Revenue con-
(73) cerning the matters charged in the thirteenth count, was made by the defendant, D. E. Kennedy, alone; therefore the jury will return a verdict of not guilty as to The Old Nick Williams Company.

157. All the evidence shows that the only statement made to or notice given to, the Collector of Internal Revenue concerning the matters charged in the thirteenth count, was made by the defendant, D. E. Kennedy, alone; therefore, the jury will return a verdict of not guilty as to N. Glenn Williams.

158. There is no evidence in the case that The Old Nick Williams Company was ever engaged in or ever intended to become engaged in, with N. Glenn Williams and D. E. Kennedy, or otherwise, the business of a distiller of spirituous liquors, as charged in the thirteenth count of the bill; therefore, the jury will return a verdict of not guilty as to said company on said thirteenth count.

159. There is no evidence in the case that N. Glenn Williams was ever engaged in or ever intended to become engaged in, with The Old Nick Williams Company and D. E. Kennedy, or otherwise, the business of a distiller of spirituous liquors, as charged in the thirteenth count of the bill; therefore, the jury will return a verdict of not guilty as to said N. Glenn Williams on said thirteenth count.

160. There is no evidence in the case that D. E. Kennedy did not, or that The Old Nick Williams Company and N. Glenn Williams did, own and operate said business and the premises on which the same was located; therefore, the jury will return a verdict of not guilty upon count thirteen as to all the defendants.

(74) 161. The prosecution has introduced a deed from N. Glenn Williams and wife to The Old Nick Williams Company, and the defendant, Kennedy, has introduced a deed from said company to himself, for the lands and premises on which said business was located, both of which deeds bear date prior to the date of giving the notice or making the statement referred to in count thirteen of the bill; this in law puts the title to the same in Kennedy. There being no evidence in the case that the defendant, Kennedy, held the same in any other capacity than owner thereof, it is the duty of the jury to return a verdict of not guilty on this count.

162. If the jury shall find that N. Glenn Williams and wife made the deed introduced in evidence to The Old Nick Williams Company, and that The Old Nick Williams Company made the deed introduced in evidence to D. E. Kennedy, to the premises, whether the deed to Kennedy was, at the time of

making such statement and giving such notice, as charged in the thirteenth count in the bill, registered or not, the title to such premises passed to Kennedy and the law, upon this state of facts, puts the title in him to the premises.

163. There is no evidence in the case that The Old Nick liams Company had any interest in or that it owned or operated or intended to be interested in the business of a distiller as charged in the thirteenth count in the bill; therefore, the jury will acquit said company on said count.

164. There is no evidence in the case that N. Glenn Williams had any interest in or that he owned or operated or intended to be interested in the business of a distiller as charged in the thirteenth count in the bill; therefore, the jury will acquit the said N. Glenn Williams on said count.

(75) 165. The facts, if true, that The Old Nick Williams Company and D. E. Kennedy had made a contract whereby it was agreed that The Old Nick Williams Company should purchase the entire output of Kennedy's distillery, and that the company was to make advancements of materials, grain, wood, etc., and money with which to purchase tax stamps, to Kennedy, in consideration for such output, are lawful and the contract such as they had the right to enter into.

166. And the facts, if true, that The Old Nick Williams Company and D. E. Kennedy made an agreement in which the company bound itself to take and Kennedy bound himself to let the company have the entire production of distilled spirits of Kennedy's distillery at the prevailing market prices; and that the company obligated itself, in consideration for such distilled spirits, to supply to Kennedy, grain, malt, wood and other materials, are not sufficient to justify the jury in convicting the defendants or any of them upon the thirteenth count of the bill.

167. And the facts, if true, that The Old Nick Williams Company and D. E. Kennedy made an agreement in which the company bound itself to take and Kennedy bound himself to let the company have the entire production of distilled spirits of Kennedy's distillery at the prevailing market prices; and that the company obligated itself, in consideration for such distilled spirits, to supply to Kennedy, grain, malt, wood and other materials, are not evidence competent for the jury to consider in this case in passing upon the allegations contained in the thirteenth count in the bill of indictment.

168. The facts, if true, that The Old Nick Williams (76) Company and D. E. Kennedy made an agreement in which the company bound itself to take and Kennedy bound himself to let the company have the entire production of distilled spirits of Kennedy's distillery at the prevailing market prices; and that the company obligated itself, in consideration for such distilled spirits, to supply to Kennedy grain, malt, wood and other materials, as well as money with which to purchase revenue stamps, are consistent with the hypothesis of the innocence of the defendants, and it is the duty of the jury to adopt that hypothesis in this case and to return a verdict of not guilty upon the thirteenth count in the bill.

169. Evidence of other transactions than those charged in the various counts in the bill of indictment upon which the defendants are now being tried can only be considered by the jury in so far as such evidence may tend to show the motive and intent with which the defendants did the acts charged in the bill of indictment, if they should find that they did such acts at all. Unless such evidence of other acts done by the defendants tend to throw light upon and aid the jury in determining the intent and purpose of the defendants in doing the acts charged against them, if you find they did do such acts at all, you must not give any weight to or consider such evidence of, other acts at all.

170. Although the jury may believe that the defendants are guilty of other offenses and violations of the law than those charged against them and that such other transactions about which the witnesses have been permitted to testify constitute such offenses, the jury cannot convict the defendants upon this bill of indictment on the same, and the jury should therefore not confound the defendants' acts and doings, which appear in the evidence detailed as to other transactions than those charged in the bill of indictment, with those acts charged in the bill; (77) for though the jury may believe the defendants guilty of violations of the law other than those charged in the bill of indictment, they will not be justified in finding them guilty in this case for such violation; and the jury is instructed to put out of consideration all the evidence of other transactions and doings of the defendants or any of them, no matter how wrongful and unlawful the same may appear to the jury to be, unless such transactions and doings tend to show the wrongful intent of the defendants in doing the acts charged in the bill of indictment.

171. No other violations of the law than those charged in the bill of indictment against the defendants will authorize or warrant the jury in convicting the defendants on the charges contained in the bill of indictment. If the jury should become satisfied beyond all reasonable doubt that the defendants had on one or many occasions violated the law, but not on the occasion and at the times charged in the bill of indictment, this would not justify a verdict of guilty in this case. In this case the jury must find and be satisfied beyond all reasonable doubt and from the evidence alone that the defendants violated the laws of the United States as charged in the bill of indictment and in the way and manner therein charged, or they will return a verdict of not guilty on these charges.

172. According to the undisputed evidence in this case, The Old Nick Williams Company, at the time mentioned in the bill of indictment, was by permission of the government, engaged in carrying on the business of a wholesale liquor dealer, the business of a rectifier of distilled spirits and the business of a retail liquor dealer, and had paid the special taxes required by the government to be paid for the privilege of carrying on each of said businesses. Under these circumstances it became (78) the duty of The Old Nick Williams Company, when it purchased a package of distilled spirits in its capacity as a wholesale liquor dealer or a rectifier, which was to be used by it in its wholsale or rectifying business, to enter said transaction upon its wholesale or rectifying books prescribed by the Commissioner of Internal Revenue for that purpose and to also enter upon said books such other information as the said commissioner required, including the fact of the sale of such package, when sold, to whom sold and also to make due report of said transactions to the Collector of the District upon forms provided by said Commissioner of Internal Revenue. But the law did not require the Old Nick Williams Company as a retail liquor dealer to make or keep such record of packages of distilled spirits purchased by it for the purpose of being used and which were used by it, in its business as a retail liquor dealer, and as such retail liquor dealer it had the right, common to all retail liquor dealers, to purchase wholesale packages which were duly stamped in such numbers and amounts as it might see fit, from licensed wholesale liquor dealers or distillers, without making any record whatever of said transactions or reporting the same to the Collector or other government official. It also had the right, as such retail liquor dealer, to purchase retail packages, or packages under five gallons, from a retail and wholesale liquor dealer, in such quantities as it might desire, or to pur-

chase retail packages in quantities not exceeding 20 gallons, from any person though not a licensed wholesale or retail liquor dealer, without making any record of such transactions or reporting the same to said Collector or other government official. This being the law, the court charges you that although you should be satisfied from the evidence that The Old Nick Williams Company did sell quantities of spirits in retail packages greatly in excess of the amounts shown by its wholesale or rectifying books to have been charged off to its retail business, yet the fact that it did sell said quantities of liquor (79) in retail packages in excess of the amounts so shown to have been charged off to the retail business, is not sufficient evidence to warrant the jury in finding beyond a reasonable doubt that the liquor so sold was sold by the defendants or either of them in violation of law, or that they or either of them, are guilty of the offenses charged in the several counts in the bill of indictment, because the liquor thus sold may have been purchased from persons other than those shown by the wholesale or rectifying books of The Old Nick Williams Company for use in its business as a retail liquor dealer.

173. The burden is upon the government to satisfy the jury beyond a reasonable doubt of the existence of every essential fact upon which it relies to convict the defendants of the several offenses charged in the bill; therefore if the government relies upon the fact that The Old Nick Williams Company sold retail packages of spirits greatly in excess of the amounts which its wholesale and rectifying books show were charged off to retail, for the purpose of showing that the spirits so sold or a part thereof were non-tax paid, or were withdrawn from wholesale or rectified packages contrary to law, or a proper record of such wholesale or rectified packages had not been made and kept upon said wholesale or rectifier's books, then the government must also satisfy the jury beyond a reasonable doubt of the fact that the spirits so sold by The Old Nick Williams Company in retail packages as aforesaid were not purchased by it as a retail liquor dealer, either in wholesale properly stamped packages or in retail packages, or both, from persons authorized by law to sell the same, for use by it in its retail business; and if the government has failed to so satisfy you, then you will not consider the evidence of these sales in passing upon the question of the guilt or innocence of the defendants in this case.

174. Unless the jury are satisfied by the evidence beyond a (80) reasonable doubt that the defendants, The Old Nick

Williams Company, owned the distillery operated in the name of D. E. Kennedy, or had an interest therein, then it will be the duty of the jury to acquit the said company on the twelfth count in the bill of indictment.

175. Unless the jury are satisfied by the evidence beyond a reasonable doubt that the defendant, The Old Nick Williams Company, owned the distillery operated in the name of D. E. Kennedy, or had an interest therein, then it will be the duty of the jury to acquit the said company on the thirteenth count in the bill of indictment.

176. Unless the jury are satisfied by the evidence beyond a reasonable doubt that the defendant, X. Glenn Williams, owned the distillery operated in the name of D. E. Kennedy, or had an interest therein, then it will be the duty of the jury to acquit the said X. Glenn Williams on the twelfth count in the bill of indictment.

177. Unless the jury are satisfied by the evidence beyond a reasonable doubt that the defendant, X. Glenn Williams, owned the distillery operated in the name of D. E. Kennedy, or had an interest therein, then it will be the duty of the jury to acquit the said X. Glenn Williams on the thirteenth count in the bill of indictment.

178. Unless the jury shall become satisfied by the evidence beyond a reasonable doubt that D. E. Kennedy owned or had an interest in the rectifying business run in the name of the Old Nick Williams Company, he would not be guilty under counts one, two, three, four, five, six, seven, eight, nine, ten, eleven, fourteen and fifteen, and the jury will so return their verdict.

(81) 179. The fact, even should it be found by the jury, that D. E. Kennedy was the laborer or employee of The Old Nick Williams Company, and as such did work for the company, would not make him guilty under this bill of indictment of engaging in and carrying on the business of a rectifier of distilled spirits. Before the jury can find him guilty in this case upon counts one, two, three, four, five, six, seven, eight, nine, ten, eleven, fourteen and fifteen, or any of said counts, they must find that he owned or had an interest in or engaged in or carried on the business of a rectifier of distilled spirits otherwise than as such laborer or employee. Simply being in and aiding, etc., the business, as a laborer or employee of the company in carrying on such business, is not sufficient to warrant the jury in convicting him.

180. The facts, if true, that N. Glenn Williams was a stockholder in and was the president of The Old Nick Williams Company, and as such president and in his official relation to the company as such president, aided in or managed its business as rectifier, does not make him guilty. Therefore, before the jury can find him guilty on counts one, two, three, four, five, six, seven, eight, nine, ten, eleven, fourteen and fifteen, they must find that he owned or had an interest in or engaged in or carried on the business of a rectifier of distilled spirits, otherwise than as such stockholder or president. Simply being such stockholder and president is not sufficient to warrant the jury in finding him guilty.

181. There is no count in the indictment charging D. E. Kennedy with aiding and abetting, and the fact, if true, that the defendant, D. E. Kennedy, aided and abetted The Old Nick Williams Company in its business as a rectifier of distilled spirits, even should it be found beyond a reasonable doubt that the company did engage in and carry on the business of a rec-
(82) tifier of distilled spirits unlawfully, does not justify the jury in convicting him.

182. There is no count in the indictment charging N. Glenn Williams with aiding and abetting, and the fact, if true, that the defendant, N. Glenn Williams, aided and abetted The Old Nick Williams Company in its business of a rectifier of distilled spirits, even should it be found beyond a reasonable doubt that the company did engage in and carry on the business of a rectifier of distilled spirits unlawfully, does not justify the jury in convicting him.

183. All the counts in the bill of indictment charge that all the various offenses were committed jointly by the defendants. It is necessary that the prosecution should prove to the satisfaction of the jury and beyond a reasonable doubt that such offenses were so jointly committed, as charged, before they can convict the defendants or any of them. Therefore, even should the jury find that the offenses charged were committed by one or two of them, but that the other defendant did not participate or join in the commission of the offense, the jury will acquit all the defendants.

184. There is no evidence in the case that the offenses charged in the bill were jointly committed by the defendants. The jury will, therefore, return a general verdict of not guilty.

Refused.

185. The defendants respectfully request that the court direct the jury to return a verdict upon each count in the bill of indictment, unless they find them not guilty as to all of said counts, when they will return a general verdict of not guilty.

J. E. ALEXANDER,
THOMAS SETTLE,
W. P. BYNUM, JR.,
BURWELL & CANSLER,
MOORE & ROLLINS,
Attys. for Defts.

Endorsed:

Filed in this office Jan. 10, 1906.

SAM'L L. TROGDON, Clerk.

JUDGE'S CHARGE.

(83) The court charges the jury as follows:

United States of America *vs.* Old Nick Williams Co. et al. } Charge of the Court.

Gentlemen of the jury. This trial, which has necessarily consumed considerable time in taking the testimony and in the argument of counsel, has now reached that stage when it devolves upon the court to lay down to you the principles of law, which are to govern you in the consideration of the several charges set forth in the bill of indictment. And the court will say to you, gentlemen, in the outset that whatever of discussion may have taken place during the progress of the trial relative to the propositions of law involved, those which the court declares are the principles upon which you are to act.

It may be well, gentlemen, in the outset to direct your attention to the nature of the charges which are preferred by the Government against the defendants. These charges are under what is known as the "Internal Revenue Laws of the Government." This is a system of laws provided by the Congress of the United States for the purpose of collecting revenues, or taxes, as they are commonly called, and in order to effectually enforce the laws, Congress has seen fit to prescribe certain penalties and punishments for the violation or evasion *to* these laws,

and many of these provisions of the law are made criminal, and subject those who violate them to conviction in the criminal courts and punishment for the offence.

Now, it may be further as well that I should call your attention to the manner of conducting the two kinds of business, which are principally involved in this trial,—that of a rectifier of distilled spirits, and that of a distiller of distilled spirits.

The distiller is the producer of the article, which is the subject of this investigation, and the court will undertake to enlighten you as to the method in which that business should be conducted in order to comply with the provisions of the law.

The distiller is not, gentlemen, so far as the law is con-
(84) cerned, the party who may do the manual labor around and about the distillery establishment, but under the provisions of the law, he is the owner, the proprietor, the person interested in the operation, the management and the results of the establishment. Before a person is authorized to begin the business of a distiller of spiritous liquors from grain, he is required by the law to have made what is known as a survey of his distillery and his premises, giving the various kinds of apparatus that he proposes to use in the conduct of his business, as well as the metes and bounds of the premises and general character of his place. He is required to have what is known as his capacity surveyed; that is, the capacity of his fermenters, and his stills and other implements to be used in connection with his business; and also the amount of material is required to be shown, which he intends to consume in the operation of his manufactory.

He is also required to give a bond to pay all penalties and tax assessments, which may be made against him by reason of the fact that he is carrying on this business. He is required to keep a book, upon which he will enter each day the material he purchases for use in his distillery, from whom purchased; and he is also required to keep a book in which he enters the exact results of his operations: that is, each day the total amount of spirits which may be produced at his distillery.

Further, in the inception of his business, gentlemen, he is required to give a notice to the Government of his intention to carry on this business, in which notice he shall describe to the collector, in terms, the interest he may have, or that others may have, in the distillery which he proposes to operate; and further that that, gentlemen, he is required to pay a tax, a stamp tax of $1.10 upon every proof gallon of distilled spirits produced at this distillery; that is, 100 being the standard proof, he is required to pay to the Government before he can

remove his spirits from his distillery warehouse, unless he retains it in bond, under another provision of the law,—he is required before he can put his spirits upon the market to apply to the collector upon what are known as "withdrawal Papers," (85) and pay a tax of $1.10 upon every proof gallon of distilled spirits, have the stamps indicating the payment of the tax affixed to the cask containing the spirits properly cancelled, and then he is entitled under the law to remove the spirits from his warehouse and place it upon the market. If, however, he produce spirits less than 100 proof, that is, if it comes from his distillery and goes into his cistern room at less than 100 proof, then the law says that he shall pay this tax of $1.10 per gallon upon the wine gallons and not upon the proof gallons. If he produces distilled spirits of greater proof than 100, then the law says that whenever, in the aggregate, there is additional proof over 100 to make it an additional gallon, then he is required to pay the $1.10 tax upon that additional gallon.

The spirits are required by the law to go from the distillery into what is called a cistern room; that is, no part of the spirits is allowed to be removed from the distillery until it has reached the cistern room, and then the distiller cannot himself remove it. It can only be taken from the cistern room by the Government officer, known as a guager, who is placed there, and who has charge of the cistern room under a lock and key, provided by the Government; and he is authorized to enter the cistern room and guage and estimate the quantity of spirits, wine, are run into the cistern, and place it in proper packages and mark it and then remove it to the distillery warehouse. Then follows, as I have said before, the right of the distiller to send up his withdrawal papers, pay the tax and place it upon the market.

A rectifier, gentlemen, is one who has the right to change the proof and change the character of distilled spirits which have been tax-paid theretofore. You will understand that distilled spirits pay the tax, that is, the gallon tax, only once. Whenever the tax has been paid, and the package properly stamped, and the stamps cancelled as required by law, then the spirits is upon the market for all lawful purposes. But the rectifier, as I have said, has the right to change the character of tax-paid distilled spirits. That is, he can apply to the collector and pay the tax provided for the privilege of operating as a rectifier, and after that he is not required to pay any addi- (86) tional tax upon the spirits; he simply pays $100.00 a year, I believe, for the privilege of carrying on the business of a rectifier, and that authorizes him to purchase tax-paid spirits in original packages, carry it to his rectifier, and then make

application to the collector to be authorized to rectify it; or to use the expression, which is common, to "dump it" for rectification.

Now, in making this application, he uses a form provided by law, provided by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, I believe, under the provision of the law, known as Form 122. On that form a rectifier, when he proposes to rectify a package, describes this package of distilled spirits to the collector. He says in substance to the collector: "I have in my rectifying house a certain package of distilled spirits, containing a certain number of proof gallons and a certain number of wine gallons, manufactured by such and such a person, and upon which is tax-paid stamp, serial number so and so," and he requests of the collector that he send to his place of business a guager to inspect that package and see that it is the package, which the rectifier has described in his application. Thereupon, the collector sends the guager, and the guager acts. He inspects the package and if he finds the package as the rectifier has reported, thereupon he enters—or the collector enters—that package with its proof and its number of gallons upon another form prescribed by the Internal Revenue authorities, known as Form 64.

Now, Form 64, is very much in character like a bank account. In order to illustrate to you, I will show you, if I can, how Form 64 is kept. Suppose the rectifier has a barrel or package, as commonly called in Internal Revenue parlance, containing 50 gallons of 100 proof spirits. When the guager ascertains that the package is there, 50 gallons of 100 proof spirits, he enters it to the credit of the rectifier upon this Form 64—a description of the package and gives credit to the rectifier for 50 gallons of 100 proof spirits. Thereupon, the rectifier is authorized to dump the package; that is, he is authorized to take the contents of this package and dump it into his rectify-
(87) ing tanks, add to it extraneous substances, or matter such as he may use, and properly dilute it with distilled water, or whatever else he thinks is necessary, and reduce its proof to any degree he sees proper, and it percolates through his rectifying tanks, through charcoal, sand, blankets, or whatever else he may think necessary to use for the purpose of removing from it the foreign substances in the original spirits, such as fusil oil, verdigris or other extraneous ingredients, and when it has gone through the rectifier, down into his vessels, then it is ready for another inspection by the Government officer.

The rectifier then calls the attention of the Government officer again to the fact that he has rectified that package, and upon a form called 237, he applies again to the collector to send

his officer and inspect the results of the rectification of that package. Now, if he has made 500 gallons of 10 proof liquid from 50 gallons of 100 proof, he is entitled to it. If he has made 100 gallons of 50 proof from it, he is entitled to do it; and thereupon, the guager will go and inspect the results of his rectification of that package, and will charge him upon this form 64 to the extent that he has credit for 100 proof spirits originally entered. Now, you understand? He began with 50 gallons 100 proof; he has run it through his rectifier and diluted it, or otherwise added to it and reduced its proof, then he is entitled to have it guaged and is entitled to have the right to utilize in his business the results of that rectification: provided, the proof when aggregated in the end does not exceed the amount of proof gallons for which he has credit on Form 64, originally.

Now, he is not required to pay any further tax. The law simply requires that he shall only have inspected and guaged the results of the original package, which was tax-paid and went into his rectifier, and if the original report, and the credit upon Form 64, and the application upon 237, and the guager's inspection, show that he is entitled to have issued to him what is known as Rectifiers' Stamps, they are issued in order to identify the result of that rectification.

Now, gentlemen, it may be well after having given you (88) that explanation of the character of the two kinds of business involved in this case, to read you the Statutes of the United States, under which this Indictment is drafted, or at least call to your attention the parts of these statutes pertaining to the case. The First Count, as it is called in this Indictment, is drafted under section 3317 of the Revised Statutes. This Count in the Indictment charges that the Old Nick Williams Co.,—a corporation, N. Glenn Williams and D. E. Kennedy, carried on the business of rectifiers of distilled spirits with intent to defraud the United States of the tax upon spirits rectified by them.

"Every person who engages in, or carries on, the business of a rectifier with intent to defraud the United States of the tax on the spirits rectified by him, or any part thereof, or with intent to aid, abet or assist any person or persons in defrauding the United States of the tax on distilled spirits, or who shall purchase or receive, or rectify any distilled spirits which have been removed from a distillery to a place other than a distillery-warehouse provided by law, knowing or having reasonable grounds to believe that the tax on said spirits, required by law, has not been paid, shall, for every such offense, be fined not less than one thousand dollars nor more than five thousand

dollars, and imprisoned not less than six months nor more than two years."

That is the section, gentlemen, of the law—the provision of the law—under which the First Count in this Indictment is drafted.

The next Count to which I shall call your attention, because before I close, it is the purpose of the court to eliminate from the consideration of the jury the several Counts in the Indictment, save those to which the court will refer.

The next Count is drafted under Section 3318 of the Revised Statutes, and it charges an offense which is described by the law for failure to keep the books provided by the law.

"Every rectifier and wholesale liquor dealer shall provide a book, to be prepared and kept in such form as may be prescribed by the Commissioner of Internal Revenue, and shall, on the same day on which he receives any foreign or domestic spirits, and before he draws off any part thereof, or adds water or anything thereto, or in any respect alters the same, enter in such book, and in the proper columns respectively prepared for the purpose, the date when, the name of the person or firm from whom, and the place whence the spirits were received, by whom distilled, rectified or compounded, and when and by whom inspected, and, if in the original package, the serial number of each package, the number of wine-gallons and proof gallons, the kind of spirits, and the number and kind of adhesive stamps thereon. And every such rectifier and wholesale dealer shall, at the time of sending out of his stock or possession any spirits, and before the same are removed from his premises, enter in like manner in said book the day when and the name and place of business of the person or firm to whom such spirits are to be sent, the quantity and kind or quality of such spirits, the num-
(89) ber of gallons and fractions of a gallon at proof, and, if in the original packages in which they were received, the name of the distiller and the serial number of the package. Every such book shall be at all times kept in some public or open place on the premises of such rectifier or wholesale dealer for inspection; and any revenue officer may examine it and take an abstract therefrom; and when it has been filled up as aforesaid, it shall be preserved by such rectifier or wholesale liquor-dealer for a period not less than two years; during such time it shall be produced by him to every revenue officer demanding it."

The next Count to which I will call your attention is under Section 3281 of the Revised Statutes.

"That any person who shall carry on the business of a rectifier, wholesale liquor-dealer, retail liquor-dealer, wholesale dealer in malt liquors, or manufacturer of stills, without having paid the special taxes required by law, or who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than one hundred dollars nor more than five thousand dollars and imprisoned not less than thirty days nor more than two years."

The next section is section 3259.

"Every person engaged in, or intending to be engaged in, the business of a distiller or rectifier, shall give notice in writing, subscribed by him, to the collector of the district wherein such business is to be carried on, stating his name and residence, and, if a company or firm, the name and residence of each member thereof, the name and residence of every person interested, or to be interested, in the business, the precise place where said business is to be carried on, and whether of distilling or rectifying; and if such business is carried on in a city, the residence and place of business shall be indicated by the name of the street and number of the building. In case of a distiller, the notice shall also state the kind of stills and the cubic contents thereof, the number and kind of boilers, the number of mash-tubs and fermenting tubs, the cubic contents of each tub, the number of receiving cisterns, the cubic contents of each cistern, the number of hours in which the distillery will ferment each tub of mash or beer, the estimated quantity of distilled spirits which the apparatus is capable of distilling every twenty-four hours, a particular description of the lot or tract of land on which the distillery is situated, and of the buildings thereon, including their size, material and construction; and that said distillery premises are not within 600 feet, in a direct line, of any premises authorized to be used for rectifying or refining distilled spirits by any process."

And it is made a criminal offence to give a false notice under that section.

The next section is Section 3296, upon which one of the Counts of this Indictment is based, and that is the section which makes it a criminal offence for any person to remove to a place other than a distillery warehouse provided by law, distilled spirits upon which the taxes required by law have not been paid.

"Whenever any person removes, or aids or abets in the re-
(90) moval of any distilled spirits on which the tax has not been paid, to a place other than a distillery warehouse provided by law, or conceals, or aids in the concealment of any spirits so removed, or removes or aids or abets in the removal of any distilled spirits from any distillery warehouse, or other warehouse for distilled spirits authorized by law, in any manner other than is provided by law, or conceals or aids in the concealment of any spirits so removed, he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than two hundred dollars nor more than five thousand dollars, and imprisoned not less than three months nor more than three years."

The contention of the Government in this case is, that the Old Nick Williams Co., a corporation under the laws of North Carolina, N. Glenn Williams and D. E. Kennedy, the three defendants indicted, acting in concert, have violated the several statutes which I have read to you.

The Government says that the company, through its officers and agents, has joined with Williams and Kennedy in the conduct of this unlawful business. The theory of the Government, as presented by the District Attorney, is that the company, which was organized, I believe sometime about the month of June, 1903, was the owner of both the rectifying house and the distillery in question, and that Kennedy was an employee of this company, of which Williams, the defendant was the president. That Williams, acting in the capacity of president of the company, and controlling its affairs, intending to arrange a method by which the two concerns, the distillery, which was also owned by the company, and the rectifying house, could be operated and conducted together, and with the intent to thus evade the taxes due to the United States upon the product of this distillery, entered into an arrangement with Kennedy by which a deed was made to Kennedy, thus constituting him the ostensible owner of the distillery. But the Government says that it was not a bona fide deed. The Government says, that although the title may have ostensibly passed to Kennedy, yet, and in fact, it was with the understanding and arrangement that Kennedy should merely be the ostensible owner, and that the distillery would continue to be under the control and management and subject to the direction of the company, with the understanding and intention that its product should go to the rectifying house and there be utilized through the rectifying house, and the product of the distillery should be put upon the
(91) market by this arrangement, through the rectifying es-

tablishment and the retail dealing of the company, with intent to evade the payment of the taxes on such product.

The Government has introduced testimony, which it is argued to you, tends to prove that state of facts. It insists that it has shown that this distillery was of a much greater producing capacity from the material, which is shown to be used, than is disclosed by the entries upon the books kept at the distillery. It insists that it has shown by the exhibition of the books of the rectifying company that large quantities of distilled spirits went out from the rectifier that could not come from any other source than from this distillery. It insists that the retail establishment of the company has been used as a conduit through which the untax-paid product of this distillery has been placed upon the market.

It insists, further, gentlemen, that the notice which was given by Kennedy was known to Kennedy and was known to the defendant Williams, and consequently, to the company, to be false. It insists that if these positions of the prosecution be true, these defendants have violated these statutes; that they have carried on the business of rectifiers, although ostensibly in the name of the company, yet really by the three, acting in concert, with intent to defraud the United States of the tax upon the spirits which were rectified in that establishment. The Government contends further, and insists that the evidence here shows that fact, that the notice which Kennedy gave, under the circumstances, was a false notice; that he gave it knowing it to be false; that he gave it knowing at the time that the company had reserved an interest in that distillery; that the notice was, therefore, misleading and imperfect, and that Kennedy gave the notice, acting in concert with Williams, as president of the company, and with Williams, individually.

The Government further insists that the entries upon the books, neither at the distillery nor the rectifying house, contained a proper history of the product of the distillery and the amount of spirits carried into the rectifier. In other words, the (92) Government insists, that these defendants, in order to carry out their unlawful purpose, have failed to enter upon the books the amount of material used at the distillery, the amount of the product of the distillery, the amount of spirits which went into the rectifying house, and the amount which went out. The Government insists further, that if that be true,—that if the product of this distillery was not correctly reported to the Government,—that if the product of the distillery went out of the distillery and into the rectifying house, without the payment of taxes, that the defendants were still acting in concert, and would be guilty of the unlawful removal of distilled spirits to

a place other than a distillery warehouse provided by law—distilled spirits upon which the tax had not been paid.

On the other hand, the defendants insist that this contention of the Government is untrue. That it is not sustained by the evidence. They insist that they have brought evidence—testimony from the mouths of the Government officers, who were sent to supervise and superintend their business, that both the distillery and the rectifying house were conducted legally, and without fraud or wrong-doing.

They insist that this fact, if it it is proven to be a fact, of the shipment of large quantities of distilled spirits is of no concern in this case, because they say that they had a right to ship, as retail dealers, being authorized by having paid the tax for that privilege—to ship in retail quantities—and that they were not required to account to the Government upon any book or in any form as to the amount of spirits they dealt in as retail dealers.

They insist further, as argued, in the case, that this prosecution has been instituted without just cause on the part of someone, who, moved by other than a purpose to uphold the law, has brought it to the knowledge of the courts.

They rely also in their defence upon the proposition of law that in all criminal prosecutions before a citizen can be convicted the presumption of innocence which accompanies an accused person in a criminal trial must be overcome and rebutted to the extent that the jury is convinced beyond a reasonable doubt of guilt.

(95) They rely further upon the fact that good character, when shown, is said by the law to be evidence in favor of the accused person and to be considered by the jury in his behalf.

Now, gentlemen, I believe, I have stated substantially the contentions of the two parties, and before I go further, I will state to you that the court, in order to simplify this case, and in order that the jury may take it divested of everything save those charges around which all others in the Indictment center, the court has concluded to eliminate from your consideration, the Counts in this Indictment, except the Count charging that these defendants carried on the business of rectifiers with intent to defraud; the Count which charges the rectifying establishment with a failure to enter upon the books the spirits received into the rectifying house for rectification, as required by law; the Count charging the giving of the false notice signed by Kennedy of his purpose to engage in the business of a distiller; and the Count for removing untax paid spirits to a place other than a distillery warehouse; and the Count charging that these three defendants carried on the business of a distiller of spirit-

ous liquors with intent to defraud the United States of the tax upon the spirits distilled by them.

The scope of your duty is confined to the principles of law as laid down by the court, applied to your findings of fact. That is your province, to determine what, from the evidence, are the facts? Then apply to them the propositions of law, and render a verdict consistent with both.

There are certain rules of testimony which govern all criminal cases. Testimony is the statement of a witness material to the issue; evidence is that which tends to prove a fact; proof is that which establishes a fact. Testimony, so far as this case is concerned, may be divided into two classes,—direct and circumstantial. Direct testimony is simple of explanation. That is where a witness testifies to a transaction within his knowledge pertaining directly to the commission of the alleged offence, or to the matter in controversy. Circumstantial evi-(94) dence is of a different character. The latter is based upon the theory that by a series of incidents and occurrences theretofore disconnected, but which are made by the testimony to become connected and form a chain of connected links from one end to the other, a fact is established. And it is a rule of circumstancial evidence that it is as forceful when it is of that character that authorizes its consideration by the jury and action of the jury upon it, that a jury is not only empowered, but it is the duty of the jury to act upon it, if the chain of circumstances is of the character which I have indicated. But, in order to make circumstantial evidence competent and efficient, the chain must be one substantial and well connected, or, as said by some law writers: "every link of the chain must be as strong as the chain itself; otherwise, a weak link destroys the strength of the chain."

It is therefore, your duty, gentlemen, to consider all the testimony. It is your province to pass upon the credibility of the witness, his manner upon the stand, the character of his statements. How does it impress you? It is your province to say. Do you regard him as credible, or are there conditions in and about his testimony, which, in your opinion, discredit him? The witness, whoever he may be—no matter whether a witness for the prosecution or a witness for the defendant you have a right to scan his testimony, to consider it, and under all the conditions to accept it, to qualify it, or accept such as you think is truthful, and reject that which you deem untruthful, or to reject it altogether, if, in your opinion, it is not the truth. Conflicting testimony arises in nearly every case of importance. It is the duty of the jury to reconcile the conflict of testimony, if possible, but if the testimony is so absolutely

antagonistic that it is irreconcilable, if it is testimony which is material and pertinent, then it is the duty of the jury to accept such testimony as they give credit to and discard that which they disbelieve.

Now, we come to this question of reasonable doubt. As was said to you in the outset by the court, and has been said to you, I believe, by every attorney who has discussed this case, (95) the law throws around every individual accused of a criminal offence and to be tried by a jury a presumption of innocence, and that presumption, says the law, abides with the accused person and protects him from conviction until the prosecution has, by testimony, either direct or circumstantial, convinced the jury—convinced the minds of the jury beyond what is called "a reasonable doubt" of the guilt of the accused.

The term that is used in the law and described to be a reasonable doubt, has been given by various courts and various law writers a definition. The most terse definition that I have heard is where the judge said that "a reasonable doubt is a doubt such as the juror might be able to give a reason for." But, that, gentelmen, does not probably express the idea, because a juror might have a doubt, and a doubt which, in his mind, was sufficient, and yet he might not be able to explain to another person the basis of his doubt sufficiently to convey to the mind of the other person that there was reason for it. It is a reason which exists in the mind of the juror based upon practical experience, based upon circumstances, based upon the surroundings, based upon sound judgment. Probably the best definition of a reasonable doubt can be given by an illustration.

The facts in the case, that is, such of the testimony as tends to establish facts, as delivered by the witnesses, as drawn from the testimony of the witnesses, is the guide to lead the minds of the jury to a conclusion. If, by the evidence, the way is blazed so distinctly that the mind travels readily to the terminus and there reaches guilt, it is the duty of the jury to return a verdict of guilty. And, although the way may become indistinct at a point, yet, if, after examination, the direct way is eventually discovered from the testimony, and the mind travels along and reaches the end and finds there located the guilt of the accused, there is no reasonable doubt. But, if viewing all of the evidence, both that of the prosecution and the defense, the index to the way becomes indistinct and uncertain at any material point, so that the mind halts and hesitates and is unable, when examining the marks of the blaze along the way, (96) to determine which direction shall be taken,—which is the proper direction to follow,—such a situation would, in the

opinion of the court, raise a doubt, based upon reason, sufficient to warrant an acquittal—such would be a reasonable doubt.

I have said to you before, gentlemen, that good character is evidence for an accused person to be considered in his behalf.

We now come to consider the case with regard to the responsibility of a corporate body. A corporation, gentlemen, is not a natural body,—it is a mere creature of the law—what is called a legal entity, having its existence by virtue of the law, with its business and affairs controlled, directed, managed and carried on through its officers, its managers and agents, whoever they may be. A corporation cannot act of itself because it is not tangible,—it has no personality; necessarily if a corporation becomes liable, either civilly or criminally, it must become so by reason of the act of its authorized agent, or agents.

Take, for instance, a railroad corporation. The corporation itself, cannot operate a train; the corporation itself cannot make a contract; the corporation itself cannot endanger the safety of a passenger; the corporation itself cannot deal wrongfully with its employees. But the corporation itself, by reason of its human instrumentalities called upon to manage, conduct and carry on its business, can be made responsible. The town ordinance, which forbids a train to run at a greater rate of speed than that named in its ordinance within its limits, could only be violated by reason of the fact that some agent of the railroad exceeded the speed. The railroad company contracting to transport a passenger safely from one point to another, could only be made responsible for the violation of such contract—for a failure to perform such contract—because some one of its agents in charge or in authority to control had violated the contract. So with this corporation.

Gentlemen, this corporation can only be made criminally responsible by virtue of the acts of its agents; and the law says it may be made criminally responsible if its agents, in carrying on its business, violate the criminal law.

Some may inquire what punishment the court could visit (97) upon the company, the corporation, in case of conviction? The law provides for that, gentlemen, by fine or penalty or confiscation of property. Of course, there could be no such thing as the imprisonment of the corporation, because as I said to you it has nothing but a legal existence,—it is a legal entity. If, therefore, gentlemen, you are satisfied from the testimony, beyond this reasonable doubt, which I have called to your attention, that the Old Nick Williams Co., this corporation, acting through its president or its other various agents, violated the laws which I have called to your attention, then the com-

pany would be guilty. If that company and its corporate authority was used by any of its various agents in the conduct of the business which it had undertaken for the purpose of violating these laws, then the corporation is guilty. Not only is the corporation guilty, but the officer who carried within his breast, or the agent who carried within his breast, the intention to so use the corporation, would be guilty. Not only that, but others indicted for acting in concert, and joining in a common purpose with the view in the ultimate end of a violation of the criminal laws of the United States would be guilty. The company was authorized, as a corporation, to carry on the business of a rectifier, and although the president had no knowledge of it, yet if other agents of the company used the name and the business rights of the company to defraud the Government of the United States, the company would still be guilty, although it may have been done without the knowledge and consent of its chief officer, because the other agents, the other directors, the other managers, would be equally competent to involve the company by their acts in the commission of a criminal offence.

Coming to the question of false notice, gentlemen, by the distiller. Now, are you satisfied by this testimony, beyond a reasonable doubt, that the arrangement as contended by the prosecution was made there with Kennedy? Are you satisfied that it was made by the defendant, Williams, for the purpose of opening the way to evade the taxes due the United States from that business? Are you satisfied that the distillery and rectifying house were to be run there under this arrangement (98) with the common purpose, entered into by Williams, as president, and joined in by Kennedy? Was the business to be carried on connectedly there, one being the agent of the other, with a view of evading the payment of taxes upon the distilled spirits produced there or anywhere else? If you are satisfied of that fact, beyond a reasonable doubt, then the company, Williams and Kennedy would all be guilty of carrying on the business of distillers with intent to defraud? If this arrangement was fictitious, as is insisted, and Kennedy was merely put there for an illegal purpose and he knew that, then his notice to the Government, which required him to give notice of all persons interested in that distillery or to be interested, was a false notice, and not only Kennedy would be guilty of the offence, but if the company, acting in concert with its president, and the president acting for the company, the company would be guilty as well as the president individually.

But, gentlemen, such facts must be proven. I am stating to you the principles of law which will apply in case you conclude that the facts are such as to warrant that conclusion.

There has been some discussion here, and the court feels at liberty to call your attention to that discussion, of the visit of certain witnesses, who have been introduced here, to this distillery since the commencement of this trial. Now, gentlemen, the court will state to you that that visit by the Revenue Agent was not a trespass. The law authorizes a revenue agent to visit a distillery at any time, either by day or by night, that he may see proper, in order to investigate its condition with a view to seeing that it is operated legally and in accordance with the regulations. As to the effect of the testimony produced by such visit, that is a matter for you, as to how it may reflect upon the testimony, or how far it may discredit the testimony that is a matter for you. The court only feels that, under the law, you should be advised that it was no trespass in the revenue officer to go there and take with him such others as he deemed necessary in order to examine the condition of that distillery. That was not a trespass upon a legal right.

Gentlemen, it has been requested that this Indictment be (99) given to you, and so far as the court sees there is no objection to that, and I will by pencil-mark indicate the Counts in the Indictment which you will take under consideration. The court eliminates, as has been stated before, those other Counts, in order to simplify, as far as possible, your duty, and because the testimony, if such there be, upon the other Counts, all tends, if it has a tendency at all, to prove, to establish, the several offences involved in the Counts which the court submits to your consideration.

Now, gentlemen, we have come to that point at which a duty devolves upon you to be performed. This case is an important one, as has been stated,—an important case both to the Government and to the defendants. It is important that guilt should be proven before verdicts of guilty are rendered, but it is equally important, if guilt is proven, that verdicts of guilty should be rendered. When a case of this character reaches you, gentlemen, and reaches the court, it is divested of every consideration except the ascertainment of the truth and the application of the principles of law to the truth.

We readily respond to our sympathies, and unfortunately, we frequently as readily give way to our prejudices. It is a weakness of our nature and perhaps we cannot help it, and yet in the responsible positions that you and I occupy, we ought, if possible, to divest ourselves of such influences. The judge on the bench has no right to inject his prejudice or his feeling into a case where the rights and liberties of a citizen are involved, or where the rights and demands of the Government, which he serves, are involved. Neither has the juror, who sits in the

box, who has taken that solemn oath and has appealed to the Searcher of all hearts to view his conscience and see that he will do his duty. He should not let fear, favor, affection, prejudice, hatred, malice or any such consideration affect his discharge of duty.

No matter whether you believe it is right to manufacture distilled spirits or not, The Government of the United States settles that, not you or me. The Government says that if a citizen wishes to carry on the business it will make him pay for (100) the privilege, and the privilege is the tax upon the product of his business. So it says to the rectifier. The Government does not forbid you to carry on this business, but for the privilege of carrying it on you must pay the tax, and you must conduct your business within the scope and requirements of the law; otherwise, the Government will hold you to an accountability.

Now, gentlemen, as said to you by the court, divesting yourselves of every purpose, as I have no doubt you will, save to do that which should be done in this case, save to consider this testimony and the evidence carefully, diligently, conscientiously and determine what has been established? What does it prove? All of it? If it proves to your mind beyond a reasonable doubt that these defendants, or any one of them, is guilty, then by the law and under your oaths, you should return a verdict of guilty. If, however, upon all the case, your minds have this reasonable doubt as to all the defendants, or any one of them, the law says they are entitled to the benefit of that doubt. Further, says the law, if, after you find the facts and determine from the evidence what the real facts are, you can adopt a reasonable hypothesis, based upon those facts, consistent with the innocence of the accused persons, the law says to adopt it. But it must be a reasonable hypothesis, says the law, based upon the facts, in order to authorize you to extend the benefit of that hypothesis to an accused person. Now, gentlemen, you will take the case.

As I said awhile ago, you will take the case, divested of every purpose, as I have stated, except to ascertain the truth and apply the law as laid down by the court, and return a verdict consistent with the facts and the application of the principles of law. It is not a case, as I said while ago, which should be decided upon prejudice or feeling or anything outside of the testimony.

We all realize the fact that there is a controversy going on in the public mind and public press in regard to the distillation, manufacture and sale of liquor, but that has nothing to do with a case of this sort. That should not enter into the

consideration of the jury in this case, because the Government (101) has said you pay the license and the tax and you may proceed with this business, so far as the Government is concerned.

On the other hand, gentlemen, there may be among you those who have feeling or prejudice or opposition to what are known as "prohibition laws." That should not affect your consideration of this case, or your ultimate determination of the case. You are not trying that question, whether it is right or wrong to manufacture and sell liquor, but whether or not these defendants, engaged in this business, have conducted their business according to law, and if not, whether or not they, or any of them, have violated the charges in the Bill of Indictment, and whether that fact has been shown to your minds beyond a reasonable doubt?

Gentlemen of the jury. The court inadvertently overlooked a matter which is involved in this case, and which is insisted upon by the District Attorney, as an evidence of guilt, and which, on the other hand, the defendants' counsel insist is not a requirement, and that is, the regulation issued by the Commissioner of Internal Revenue in regard to the duty of a wholesale liquor dealer to keep a record when he joins his business with that of a retail dealer.

The court will charge you that such a regulation is a reasonable regulation. The commissioner has a right to make such a regulation, but the violation of the regulation does not constitute a criminal offence, because the commissioner has no right, even with the approval of the Secretary of the Treasury, to make a regulation, the violation of which would constitute a crime, but he has a right to make the regulation with a view to affording a check upon such persons as engage in both the wholesale and retail business of liquor dealers together; that is, where a person being a wholesale liquor dealer takes out license to carry on the business of a retail dealer, or vice versa, and carries it on in the same place, on the same premises, then it is reasonable for the commissioner to say that that wholesale dealer, being at the same time a retail dealer, should enter upon his books all packages brought in, and transferred to his retail (102) business. The court charges you that the failure of a wholesale dealer, who is also a retail dealer, to keep this record may be considered by the jury as evidence tending to support the theory of the Government, if in fact, you find that he failed to keep it. That is about all there is of that. It was argued by counsel for the defendants that it did not constitute a crime, and the court is in accord with that view. But if the Government has shown that there went into the wholesale establish-

ment quantities of spirits bought from other places but not entered upon the retail books of the company that may be considered by the jury as a circumstance in connection with other circumstances tending to show unlawful purpose.

In answer to a question propounded by a juror the court charged the following:

I said that a corporation could only act through its officers, directors, managers or agents. That it took some human act to involve the corporation in a criminal liability; that the act of the agent of the corporation would be the act of the corporation, and if that was a criminal act of the agent in connection with the business of the corporation, then the corporation would be guilty, and the officer or agent also who does the act with the criminal intent, because the criminal intent is the essence of all criminal prosecutions. The officer, director or agent, who does the unlawful act with the criminal intent would also be guilty in conjunction with the corporation.

(103) JUROR: If your Honor please, we came for instructions—The Bill of Indictment calls for 15 Counts, and we understood that they would all be stricken out except a certain number, and there is a certain number not struck out, 7. We wanted to know whether to make a verdict on the three or on the seven.

COURT TO COUNSEL: Gentlemen, I thought you could arrange the Bill of Indictment.

Judge BYNUM: We understood your Honor had stricken out all but four.

COURT: My purpose was to permit the jury to consider the Count in regard to carrying on the business of rectifiers with intent to defraud the United States of the tax on the spirits rectified in the Old Nick Williams Company's establishment. Another Count that I intended to retain for their consideration was the Count, whatever the number may be, for failure on the part of the Old Nick Williams Co., as rectifiers, to enter upon its books, packages received into the rectifying establishment for rectification. The third Count that I intended to leave upon the Indictment is the Count charging the giving of the false notice to the collector as to the ownership of and interest in the distillery. The fourth Count that I intended to keep and retain in the Indictment was for carrying on the business of distillers with intent to defraud the United

States of the tax on the spirits distilled. And the fifth Count that I intended to retain, as I said, was the Count for removing to a place other than a distillery warehouse provided by law spirits upon which the tax had not been paid. Those were the five Counts.

While I said the testimony tending to sustain the contention of the Government as to the other Counts, might be considered in connection with those Counts, in order to simplify the case, that in the opinion of the court, the other offences charged all centered around these Counts, the jury might take the case and consider it upon those Counts.

Gentlemen of the jury. One charge that is left for your consideration is the Count charging that the Old Nick Williams Co., N. Glenn Williams and D. E. Kennedy carried on the business of rectifiers of distilled spirits with intent to defraud (104) the United States of the tax upon spirits rectified by them. The next charge for you to consider is the Count in which it is charged that the Old Nick Williams Co., failed to enter upon the books provided by law for such entries, spirits which were received by the company for the purpose of being rectified, in which Count N. Glenn Williams and D. E. Kennedy are also joined. The third Count is that the three defendants, through D. E. Kennedy, gave to the collector a false notice as to the interest and ownership of the distillery, and the fourth Count is the charge in the Indictment that these three defendants, by concert of action, carried on the business of distillers with intent to defraud the Government of the United States of the tax upon spirits distilled by them; and the fifth Count for your consideration is that these three defendants removed to a place other than a distillery warehouse provided by law distilled spirits upon which the tax due the Government had not been paid. Those are the five charges, gentlemen, and so far as the testimony is concerned pertaining to other Counts you will only consider that with a view of passing upon these Counts.

I omitted to say to you in my regular charge that it is the province of the jury to pass upon these several charges separately, to either acquit or convict as they see their way clear upon any of the Counts or upon all of them, and to either acquit or convict all of the defendants, or one or more of the defendants, upon any one of the Counts in the Indictment. The jury can say guilty upon one Count, and not guilty upon the other Counts. The jury can say that one of the defendants is guilty upon a Count, and the others are not guilty, that two are guilty and the other is not guilty, or all of the defendants are guilty, or vice versa.

JUROR: Shall we make answer, guilty or not guilty, to the Counts as they appear there, or frame the answer from those four Counts?

COURT TO COUNSEL: Take this Bill of Indictment and mark with an asterisk the several Counts that I referred to.

EXCEPTIONS TO CHARGE.

(105) No objection was made by defendants' counsel to any particular part of the charge, or proposition of law as stated therein, as delivered, nor any exception noted to the refusal of the court to give any particular one, by number or in substance, of the requested instructions, but defendants' counsel did then and there file the following paper:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.
FOURTH CIRCUIT, AT GREENSBORO.

United States
vs.
The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy.

Exceptions to refusal to charge defendants' requests, etc.

The defendants, while the jury are still in the jury box, and at the bar, respectfully except to his Honor's refusal to charge each and every of their special prayers for instructions, which were refused by him, and they further except to the modification of each and every of their special prayers for instructions, which were modified by him; and they still further except to the giving of such instructions and to the giving of each of them so modified.

BURWELL & CANSLER,

BYNUM, SETTLE, ALEXANDER,

MOORE & ROLLINS,

For Defendants.

BILL OF EXCEPTIONS.

(106)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, FOURTH CIRCUIT, AT GREENSBORO.

United States
vs.
The Old Nick Williams Company. } Bill of Exceptions.

Be it remembered that on the trial of this above entitled case in this court at an adjournment of the October 1905 term, on the 31st day of October, 1905, of said court, the Honorable James E. Boyd, District Judge, presiding, the following proceedings were had:

BILL OF EXCEPTIONS NO. I.

Upon the issue raised by the plea of not guilty of the defendant, The Old Nick Williams Company, the United States of America, the plaintiff, to maintain and prove the said issue on its part introduced in evidence the charter of The Old Nick Williams Company, Incorporated, obtained from the Secretary of State of the State of North Carolina, in accordance with the requirements and provisions of the statute in such cases made and provided.

(106 1-3)

NORTH CAROLINA,
Yadkin County.

Articles of agreement made and entered into with reference to the formation of a corporation, pursuant to the General Laws of North Carolina as contained in an Act of the General Assembly of 1901, entitled "An Act to Revise the Corporation Law of North Carolina."

1. The name of the corporation shall be "The Old Nick Williams Company."

2. The location of its principal office shall be at Williams, in the County of Yadkin, State of North Carolina; but the said company may have offices and other places of business in this State and elsewhere for the transaction of any and all business other than that of its regular annual meetings for the election of officers, which shall be held at its said principal office.

3. The objects for which this corporation is formed are the following: To acquire, hold and dispose of all kinds of property, both real, personal and mixed; buy, hold and manufacture all kinds of grain and fruit into spirituous and vinuous liquors, and purify and rectify the same, and deal in said products in any and all manners permissable under the laws of this State and the laws of the United States; erect and maintain mills and manufactories of wood and the products thereof; deal in timber and timber lands; cultivate lands in all kinds of agriculture; engage in the purchase, raising and disposing of live stock; buy, lease and build such boats or water crafts as may be useful or expedient on and along the Yadkin River, and operate the same for its own private use, or for hire in the transmission of passengers or freight; build houses for any and all purposes, and lease, sell or otherwise dispose of same; open roads, streets, erect bridges, acqueducts and dams across streams, and make any and all improvements to real or personal property for its own purposes or for others; own and operate a store, or stores, of all kinds of merchandise and dispose of goods and wares by retail or wholesale; advertise its commodities and extend its trade by any and all lawful methods; and in general to transact any and all kinds of business, and to do all acts and things that may be done or transacted by any person in accordance with the laws of North Carolina.

4. The amount of the total authorized stock of this company shall be one hundred and twenty thousand dollars ($120,000) divided into twelve hundred shares of the par value of one hundred dollars per share; provided, that, upon the subscription and payment of one hundred thousand dollars ($100,000), the company shall be authorized to effect its organization and commence business.

5. The names and post office addresses of the subscribers of stock, and the number of shares subscribed by each, are as follows:

N. Glenn Williams, Williams, N. C.	600
W. D. Bowerman, New York City	350
A. K. Gallandat, New York City	60
W. A. Blair, Winston-Salem, N. C.	5
A. H. Eller, Winston-Salem, N. C.	5

6. The period limited for the duration of this corporation shall be ninety-nine years.

7. The first annual meeting for the organization of the company, the election of directors and the adoption of by-laws, shall be held on the 16th day of May, 1903, and the said date of each succeeding year shall be the time for holding the regular annual stockholders meeting. The Board of Directors shall consist of not less than three nor more than five stockholders, and they shall have power to fill vacancies on their own board and to elect, appoint and employ all officers, agents and servants for the transaction of all business of the company, and to make all rules, regulations and provisions that may be deemed necessary in the course of the company's business, not in conflict with the charter of the by-laws adopted by the stockholders.

8. The stockholders shall not be individually liable for the debts, torts, fines, penalties or other obligations or liabilities of the company, and the stock of the company may be paid for in money, or other property at such valuation as the Board of Directors may agree to pay for the same, and when the stock has been paid in full, the shall *shall* be non-assessable thereafter. (106 2-3)

9. The company may, upon a resolution adopted by the Board of Directors, borrow money and secure the same by its notes, bonds, or may pledge or mortgage any of its personal or real property, and make any and all other forms of security which are allowable under the laws of North Carolina.

Witness our hands and seals this the 5th day of May, 1903.

W. D. BOWERMAN, [Seal.]

A. K. GALLANDAT, [Seal.]

N. GLENN WILLIAMS, [Seal.]

W. A. BLAIR, [Seal.]

A. H. ELLER. [Seal.]

North Carolina, }
Forsythe County. }

The annexed plan of incorporation of "The Old Nick Williams Company" has been exhibited to the undersigned and N. Glenn Williams, W. A. Blair and A. H. Eller, the persons whose names are subscribed thereto, personally appeared before me, and duly acknowledged their signature to the same.

Witness my hand and official seal this the 8th day of May, 1903.

C. A. JENKINS,

STATE OF NEW YORK,
New York County, New York City. }

The annexed plan of incorporation of "The Old Nick Williams Company" has been exhibited to the undersigned and W. D. Bowerman and A. K. Gallandet, whose names are subscribed thereto, personally appeared before me and duly acknowledged their signatures to the same.

Witness my hand and official seal this the 5th day of May, 1903.

DAVID SCHARPS,
Notary Public, N. Y. Co.

[Official Seal.]

Filed May 12th, 1903.

J. BRYAN GRIMES, Secretary of State.

STATE OF NORTH CAROLINA,
Office of Secretary of State. }

I, J. Bryan Grimes, Secretary of State of the State of North Carolina, do hereby certify the foregoing and attached (four (4) sheets) to be a true copy of the certificate of incorporation of "The Old Nick Williams Company," and the probates thereon, as the same is taken from and compared with the original filed in this office on the 12th day of May A. D., 1903.

In witness whereof, I have hereunto set my hand and affixed my official seal, done in office at Raleigh, this 13th day of May, in the year of our Lord, 1903.

J. BRYAN GRIMES,
Secretary of State.

[Seal of State.]

NORTH CAROLINA,
Yadkin County. }

I, W. A. Hall, Clerk of the Superior Court in and for said County and State, do hereby certify that the foregoing is a true copy of the certificate of incorporation of "The Old Nick Williams Company," and the probates thereon and certificate of Secretary of State as appears on record in my office.

Witness my hand and official seal this the 29th day of October, 1904.

W. A. HALL,
Clerk Superior Court.

(107) which certificate is hereby incorporated into and hereby made a part of this Bill of Exception.

The plaintiff, also to maintain and prove the said issue on its part, called the following witnesses, who, being duly sworn, testified as follows:

W. H. Woodard (Direct Examination). That he was employed by The Old Nick Williams Company from February 1, 1905, until June 20, 1905, as traveling salesman for the sale of corn whiskey, brandy and rye; received a salary of $100 per month and expenses, which amounted to $38 a weel; visited the defendant's place of business at Williams, Yadkin County, North Carolina, before starting out on the first trip about 2jnd Febuary; distant about 14 miles from Winston. They were engaged in the manufacture and rectifying of whiskey; got my sample case up and went out on the road and sold whiskey; don't know whether defendant was making whiskey or who was making it; was representing The Old Nick Williams Company, being employed by N. Glenn Williams; thought he was the whole push; I was to travel my old territory, Georgia, Florida and Alabama; Mr. Williams told me that I could tell the trade he made the best corn whiskey in the world, and he did not except anybody's goods; had the largest and most up-to-date plant east of the Ohio River; had just installed a new 101 bushel distillery and could fill any size order, and he went on to say that his cheapest grade of goods were far superiod to a great many goods at a higher price; made nothing but the purest goods, and did not buy any goods outside; did not have an ounce of western goods; every ounce he sold and shipped out was strictly his own production; said he bought the best grade of corn he could buy; made a great deal at home and bought western corn; gave me (108) prices at which I could sell. I remember mostly what the quarts were to be sold at, pints and half pints; did not have a very large trade on them considering the quart goods. The majority of the goods I sold were put in quart cases. They sold at $3.30, $3.60, $3.90 and $4.05 per case. The grades ran from 70% to 100% proof; 70%, $3.30; 80%, $3.60; 90%, $3.90, and 100%, $4.05, three gallons in a case. They were numbered 7, 8, 9 and 10. Did not have any proof number on them at all; #7 was 70%; #8 was 80% #9 was 90%, #10 was 100%. Went back to Williams in April and May. Had conversation with Mr. Williams. He said it would be impossible for him to fill orders at these prices any more on new goods. Am confident that the prices on the old goods were not changed; that is, Jolly Boy, Old Nick, six-

year, old, ten-year old and twenty-year old. Prices on these goods were $5, $6.25, $7.50, $8, and up to $12.50 per case. The changed prices on the new goods were as follows: #7, quarts, $3.75; pints, $4; half pints, $4.25 per case. Each case holds three gallons. Had no short measure. All were 8, 16 and 32 ounce. On #8, 80%, it was $4.05 quarts, $4.30 pints, $4.55 half pints; #9, 90%, $4.33 quarts, $4.60 pints, $4.85 half pints, per case; #10, 100%, $4.65 quarts, $4.90 pints, $5.10 half pints. When I left Williams this trip with these prices my first place was Atlanta and Anniston, some time towards the latter part of May. Only out two weeks or a little over. Left Birmingham and was in Charlotte on June 4th. Stayed four days in Atlanta, 1½ in Anniston, about a week in Birmingham. Goods were put up in two style bottles; same style boxes or cases as shown witness. (Witness here identifies different style cases for quarts, pints and half pints as being the kind of boxes or cases in which the defendant shipped goods. (109) Also the class of bottles used for holding these goods.) The bottles had labels on them if the purchaser wished it, also caps and wrappers. All sold at the same price whether labeled and capped or not. In speaking about distilleries, Mr. Williams stated that it was put up by the most reliable distiller in the country; called no name. Saw Mr. Kennedy all the time I was there. He stayed mostly in the bottling department, around in there where they were blending. Mr. Williams' office was between his residence and rectifying plant. Had one office there, and where most of the clerks worked was another office about a quarter of a mile from the public road. The office was about the same distance from desidence and rectifying plant. The distillery was a couple of squares from office. In February I went straight to Savannah, stayed there several days and sold several bills. Mr. Williams said not to take any orders for barrels; did not care to fill them. Wanted to sell all the goods he could in cases. I only sold seven barrels. One at $1.65, and Mr. Williams would not ship it. Sold four barrels to Blockton Dispensary, at Blockton, Ala., at $1.05; one barrel of double stamped goods at $1.35, 100%. When the whiskey is made there is a warehouse stamp put on it and it is placed in the warehouse. When the goods are taken out and shipped away another stamp is put on it, a tax paid stamp called a "Double Stamp." Sold Jasper Dispensary, Jasper, Ala., one barrel double stamped goods; sold Sig. Livington, Brunswick, Ga., barrel old goods at $1.65. That order turned down. Williams wrote letter saying he could not sell ten-year old goods at that price. Could not say whether other barrels were filled or not. In Savannah sold wholesale house some "Prince" goods; do not remember how

(110) much. Sold S. Guggenheimer & Sons and M. Furst & Sons the Prince goods. Sold Charles Graham, Gillespie Hotel, some of the $7.50 goods; 5 cases, I think. Sold another party $12.50 and $5 grades. From Savannah went to Brunswick; had small trade there. At Jacksonville sold C. C. Butler 100 cases cheap goods. Do not know proof. Cut the prices a few cents on this and Guggenheimer & Sons' orders. Sold Gus Miller 50 cases; I think 70%. Then went to Valdosta, Ga., sold few small orders there. Went to Columbus, Ga. Sold a crate of goods to Sol. Loeb & Co. Got better price for these goods. Sold Loeb 250 cases, I think, at $4.50 or $4.75 per case. New rectified goods. Went to Macon; sold a few cases there. First bill was 100 cases to Altmayer & Flattoon. Cheapest they got was 80%—80%, 90%, 95% and 100%, regular prices. Think this sale was made possibly in March. Sold some high priced goods. Don't know who to. Think sold 15 cases Jolly Boy. Sold Beddingheld & Co. 15, 20 or 25 six-year old at $6; then went to Atlanta and saw Sig. Samuels. Finally sold him 1,000 cases, after telegraphing to Mr. Williams for approval. Sold 90% goods at $3.75 per case, 15¢ off the regular price. Had no labels or caps on them. Goods wrapped in cartoons nicely. Boxes like those shown witness. Think this entire order was in quarts. I sold to A. Samuel, his brother, 1,000 cases too. He said he would fix shipments so they would not crowd my house. Gave me a standing order until early fall for 25 cases every ten days. Said in the fall he would increase order to 50 cases every ten days. Sold several other small bills there. Westbrook Distilling Co., 10 cases every month at regular prices; think I sold J. Cohen 25 cases Prince goods, standard prices. Then went to Rome, Ga.; sold somewhere from 15 to 25 cases ten-year old goods. Went to Huntsville, (111) Ala.; sold wholesale house some goods there; disremember names; I think it was $3.90 grade. Sold Mr. Everett, if not mistaken. Sold several little bills there. In Birmingham sold A. J. Odom 1,000 cases, to be shipped at his order. Sold Odom at same prices I did Sig. Samuels. His order was to be delivered in three places. Purchaser paid freight on all goods from Clemens, N. C., the defendant's shipping point. The defendant put goods in depot f. o. b. March 17th, M. Wise & Co., Birmingham, 20 cases Prince goods, #8, $3.60 per case; 10 more cases same price. Have two orders in order book for barrel goods; one West Blockton Dispensary, 5 barrels, 70%, at $1.05 per gallon, and one double stamped 100% at $1.35 per gallon. Jasper Dispensary, one barrel Double Stamped 100% $1.35. The Blockton order was March 21st, and the Jasper order was March 23rd. On the 25th sold Wise

& Co., Birmingham, 20 cases Prince goods, 80%, $3.60 per case; 5 cases Prince goods, 90%, $3.90; March 29, Stubbs & Keene, Anjniston, Ala., two cases ten-year old corn, $7.50; same date A. W. Argo, Taladega, 40 cases Prince, 90%, $3.90; 20 cases pints, same proof, $4.15; 20 cases half pints, same proof, $4.40. Same date and place D. E. Brown, 5 cases Jolly Boy, $5 per case. March 30th, S. H. Bailey, Opelika, 50 cases, 90%, $3.90 per case. April 1st, J. Cohen, Atlanta (order previously mentioned), 25 cases, $3.90 per case; Athens Dispensary April 4th, 5 cases Private Stock, $12.50 per case; April 5th, Sol. Schrawack, Augusta*k*, 5 cases Prince, 80%, $3.60 per case; same date, W. L. Norris, Augusta, 10 cases, 80%, $3.60; 5 cases, 70%, $3.30 and $3.60. Same date and place, Mrs. J. N. Rizer, 2 kegs 4½ gal. each, $1.50 per gal.; 17th, sold Pulark Dispensary 15 cases Old Nick, 6-year old, $6 per gal.; 5 cases Prince, 70%, $3.30 per case; 10 cases pints, $3.55; 10 cases (112) half pints, $3.80 per case; April 18th, sold J. M. Smith & Co., East Redford, Va., 3 cases quarts, Old Nick, 6-year old rye, $7.50; 2 cases pints, $8 per case; 12 cases half-pints free with each case. April 20th, Nathan Marks, Pocahontas, Va., 3 cases, one each quarts, pints and half pints; quarts, $3.90; pints, $4.15; half pints, $4.40, 90% goods. H. A. Metz, 5 cases quarts, 90%, $3.90; 3 cases pints, $4.15; 2 cases half pints, $4.40. April 21st, A. M. Shelton, Zenith, W. Va., 5 cases Old Nick Rye, $7.50, 12 half pints free with each case; 20 cases quarts, 90%, $3.90; 5 cases pints, $4.15, same goods. Then came into Williams. Saw Kennedy at the office several times and in the rectifying plant at different times. He was drawing off some whiskey from the rectifying tubs. One occasion when I was there there were 3 barrels near the door of the rectifier; he took bung out of the barrel, put his finger in and smelled and tasted it. I asked what it was he smelled, and he said, "Distilled water." Barrels were subsequently taken up stairs on the second or third floor in the rectifying plant. Kennedy was still there when I went back in April. Don't know of any particular thing he did.

(113)

Cross Examination. First went to Williams, Yadkin County, North Carolina, 2nd Feb., 1905. It was incorporated by the Legislature; found there rectifying establishment operated by Old Nick Williams Company. Went into the *the* rectifying house and down to a distillery; paid no attention to whose distillery it was. In order to reduce a hundred gallons of hundred proof whiskey to seventy proof, you have to put in 30% of water, I am informed. If you have a hundred gallons hundred proof and draw off thirty gallons, and put in thirty

gallons of water, you would have a hundred gallons seventy proof whiskey. You have then seventy gallons hundred proof whiskey and put in thirty gallons of water, you will have a hundred gallons of seventy proof, and you still have your thirty gallons that you withdrew of hundred proof whiskey; and if you add thirteen gallons of water to thirty gallons hundred proof, you will reduce it to seventy proof, and you will have one hundred forty-three gallons of seventy proof whiskey that you have made out of a hundred gallons of hundred proof; and if you make out of that one hundred and forty-three gallons of seventy proof whiskey and sell it at $1.05 per gallon, you will have $148.15, so that by reducing the proof from a hundred to seventy and selling low grade goods, there is more money for the rectifyer than selling at a hundred. The bottles that I sold which I saw were some filled up to the neck and some above the neck. They were filled by machinery, and when you see variations it is caused by negligence on the part of the boys filling same. A quart bottle is supposed to hold 32 ounces; I never measured (114) the bottles in question. The barreled goods that I sold at $1.05 was seventy proof whiskey. The case goods contained three gallons each, and were put up in 12 quarts or 24 pints, or 48 half pints, and was sold all the way from $3.30 a case to $12.50 per case, depending upon the grade of the whiskey. Don't know whether the prices I got were not more than the same grades of whiskey were being sold for by other parties; I admit that I sold some of the highest priced whiskey in the country. I sold the 20-year old corn at $12.50; the highest priced corn whiskey sold in the country. If the customers to whom I sold the $3.30, $3.60, $3.90 and $4.05 grades of case goods told the truth, I got more for those grades of goods than other rectifiers got who were selling the same grades. The order that I took from Sig. Samuels and sent into the company calls for 600 cases; that was for immediate shipment. I sent in other orders, on subsequent trips, from him. You can make any kind of whiskey or brandy in a rectifying establishment you want to by compounding and mixing. It is a business in itself; make it any proof you want and give it any flavor or color you want. In Birmingham I wrote the company that I was getting for their goods a higher price than any one in North Carolina was getting for the same grade of goods. That was barrel goods.

Redirect Examination. I think there is more money in selling the goods in the barrels than in the cases.

A. J. Odom. Live in Ensley, Alabama. Engaged in the

saloon business in 1904 and 1905. Bought goods from The Old Nick Williams Company from Mr. Woodard some time in March. I bought one thousand cases. Quarts, #10, $4.05, Prince, hundred proof; #9, $3.75; pints, #9, $4.00; half (115) pints, #9, $4.25; quarts, #8, $3.45; pints, #8, $3.70; half pints, #8, $3.95; shipped me a hundred cases March 18th, balance to be shipped as I ordered it. March 22nd, received 50 cases; 24th, 11 cases; May 27th, 11 cases; 30th, 12 cases; June 3rd, 11 cases; 6th, 28 cases; 7th, 25 cases; 14th, 12 cases; 27th, 25 cases; 28th, 7 cases.

J. F. Goodman. Live in Concord, North Carolina; druggist; bought whiskey from Old Nick Williams Company for Gibson Drug Co. First transaction Nov. 18, 1903; 2 cases 6-year old corn, quarts, $12.00; 2 cases 61year old corn, pints, $13.00; 53 gallons one-year old in barrel, $1.50 per gallon; Dec. 23rd, 5 cases 6-year old, $30.00; 29th, 5 cases 6-year old, $32.50.

Cross Examination. Those I bought were short; bottles not full; about 2 ounces to the quart short.

J. B. Farmer. Live in Wilson, North Carolina. Manager Wilson Dispensary since Jan. 1, 1904. Bought two shipments of goods from Old Nick Williams Company through Mr. McElwee. First shipped May 30, 1904, 5 barrels 90% corn whiskey at $1.20 per gallon. Next shipment Dec. 20th, 150 cases half pints, 10 cases pints, 10 cases quarts; 8½¢ per half pints, 16¢ for pint, 30¢ per quart; 3 gallons in the case; don't think the bottles were quite full; paid for this whiskey by checks.

Cross Examination. Paid full market price for these spirits; could buy elsewhere for practically the same figures; practically the same thing.

Francis Stevenson. Worked for Old Nick Williams Company August, 1903; one month; at Williams, N. C.; (116) worked in rectifying establishment operated by the company; was employed by Mr. Williams; went there to help rectify, but did not do a great deal of rectifying at that time; don't recollect that any spirits were withdrawn from rectification during that month; no barrel goods sold that month; all sales were made in jugs principally, holding 4.99 gallons; jugs were shipped in boxes, one in a box; saw these jugs filled; liquor was drawn by Mr. Williams from shipping house out of the barrels, with the exception of one day when I did the filling.

Shipped not less than 10 loads and not over 12 during the month is my recollection; hauled about 150 gallons a load; sent to Winston; colored boy by the name of John Hardin hauled all except one load; he was teamster for the company; saw one 5-gallon jug filled with five measures supposed to hold a gallon; I never measured it; had a great many barrels in the place where this whiskey was drawn from; probably 50; drew out of more than one barrel the same day; may be as many as three; don't know whether the barrels had stamps on them or not; never looked; brought in 5 barrels high proof spirits from Winston while I was there.

Cross Examination. The company, in addition to conducting the business of rectifying, also conducted retail liquor business; they shipped by retail as well as wholesale; the spirits that I have spoken of being withdrawn and shipped, were withdrawn from theretail department and shipped out in jugs and cases containing anywhere under five gallons; the company did not retail any liquor on the premises.

Redirect Examination. There are a good many departments in the building where the rectifying plant is; the recti-
(117) fying, wholesale and retail establishments, all three in same building in different rooms; passage from rectifying room opened into retail establishment; wholesale room in other parts of the building.

W. G. Sherman. Live in Yadkin County; 6 miles from Williams; was engaged in distilling in Williams; 5 bushels capacity; first started in April, 1904; sold goods to different parties never sold any to Mr. Williams; bought some corn from him, but don't know how much; not as much as 50 loads; don't recollect having bought any rye malt. Frank Eddleman had another distillery in the town; my distillery was about a mile from Mr. Williams.

Cross Examination. Mr. D. E. Kennedy had a distillery in Williams, and A. Dinkins also had one, but sold it to Eddleman; don't know how many government distilleries were in a radius of 10 miles of the town of Williams; there are several at Shore Town, five or six, which is within that distance; the proprietors are also rectifiers and retailers.

I. G. Sherman. Live in Yadkin County, five or six miles from Williams; operated a distillery in Williams in 1903 and 1904; begun Nov., 1903, operated about three months; then my brother took charge; eight bushels capacity; never sold any of

the whiskey produced there to Mr. Williams; never bought any corn or malt or anything from him; sold him some whiskey in June, 1903; latter part; 10 or 12 barrels; records will show how many; the whiskey was stamped "Tax paid whiskey"; they paid me $1.30 and $1.35 per gallon for it; hundred proof; know of no distilleries operating in Yadkin County in 1904 out-
(118) side of the towns of Williams and Shore; Watts Law closed them out.

Cross Examination. There are five or six tolerably large distilleries at Shore.

I. Wishon. Live in Yadkin County; engaged in the distillery business in 1903; also retail liquor dealer; never sold Mr. Williams any whiskey at retail; sold him some barrel goods; five barrels; a few days before the Watts Law went into effect; delivered it to him; whiskey house right near his rectifying establishment; paid me $1.30 per gallon; hundred proof; double stamped goods; never sold him any at retail.

W. P. Batchellor. Manager Raleigh Dispensary; since Dec. 1, 1903; purchased whiskies from Old Nick Williams Company; 795 gallons, all in cases; ranged from 6 to 20 years old; in bottles from half-pints to quarts; packed in boxes; 3 gallons to the case; bottles and box similar to those shown witness; had corrugated wrappers; bought these goods as follows: Dec. 26, 1903, 50 cases, 150 gallons, $340.00, 6- year old corn; March 12, 1904, 50 cases, 7-year old corn, $340.00; Jan. 26, 1905, 30 cases apple brandy, $180.00; Feb. 4, 15 cases, 6-year old corn, $90.00; Feb. 22nd, 10 cases apple brandy, 10 cases, 6-year old corn, $120.00; 27th, 15 cases, 6-year old corn, 15 cases apple brandy, $180.00; April 28th, 15 cases apple brandy, $90.00; May 4, 15 cases, 6-year old corn, $90.00; May 8th, 3 cases 10-year old corn, 2 cases 20-year old corn; the 10-year old corn was $8 per case—$2.66 2-3 per gallon, and the 2 cases 20-year old corn at $4.16 2-3 per gallon. I paid the defendant as high a price for his whiskey as I paid anybody else—a little higher.
(119)

W. G. Hobson. Live in Yadkin County; operated a distillery in 1903; closed by the Watts Law; sold Mr. Williams 12 packages corn whiskey; double stamped goods; hundred proof; never sold him any other, either by wholesale or retail.

R. V. Murphy. Operated a distillery in Yadkin County in 1903; at Fort Bush post office; Watts Law closed us out;

never sold Mr. Williams any whiskey. Mr. Matthews said he sold him some; never sold him any by retail.

A. C. Bruce. Live in Yadkin County; engaged in liquor business in 1903; closed out by Watts Law; was a distiller; sold Mr. Williams 10 barrels corn whiskey; I think at $1.28 and $1.35 per gallon; think it was in June, 1903; delivered a few days after; sold to The Old Nick Williams Co.; got check for it.

J. D. Hutchens. Live in Yadkin County; 15 miles from Williams; engaged in liquor business in 1903; closed out by Watts Law; sold Mr. Williams corn whiskey; 10 or 12 barrels; hundred proof; at $1.30 and $1.35 per gallon; never sold him any by retail.

W. F. Joyner. Live in Yadkin County; was in liquor business in 1903; closed out by Watts Law; sold Mr. Williams four barrels corn whiskey at $1.20 and $1.30 per gallon; hundred proof; sold him none at retail; whiskey was stamped up all right.

W. F. Schaffer. Lived in Charlotte in 1904; had transactions with The Old Nick Williams Company; bought 20 or 25 kegs of whiskey from it; got it at a shipment; every day or every other day; kegs held 4½ gallons, I think; some of it was (120) rectified whiskey; paid from $1.20 to $1.50 per gallon; don't know the proof; bought it for ninety and a hundred proof whiskey; it was in just common 4¾ gallon kegs; got a few 5-gallon jugs, I think; they were boxed; this in fall of 1904, October or November.

Cross Examination. Kegs held 4½ gallons each; jugs 4½ gallons to the jug; paid the same price for this whiskey that I paid for the same grades elsewhere.

S. R. Lentz. Lived in Charlotte in 1904; in retail whiskey business; bought some whiskey from defendant in jugs; some time last fall, October or November; about 100 or 125 gallons; came in 1-gallon jugs; 4 packed to the case; paid $1.30 and $1.35 per gallon; ninety proof; kept the jugs and paid at the rate of 10¢ per gallon for same.

Cross Examination. Paid the regular market price for this whiskey.

D. M. Abernathy. Lived in Charlotte in 1904; in retail whiskey business; bought 150 gallons of liquor from the defendant; shipped in 4½ gallons to the keg; paid $1.40, I think, per gallon; hundred proof; returned the kegs.

John F. Perry. Live in Bridgeton, N. J.; Secretary of the Cumberland Glass Manufacturing Company; sold the defendant bottles; first order Dec. 22, 1904; last April 18, 1905; 275 cases in one, 6 dozen in a case; 8 oz., 24 doz.; 16 oz., 12 doz. per case; 276 cases; 240 cases; 285 cases; there were 5 cases in all; have called out only 4; the first car I have only the total cost of; the 8 oz. bottles cost $2.35 per gross; 16 oz., $3.42
(121) per gross; quarts, $5.92 per gross; the first car amounting $701.20; the next car $700; the bottles we sold to defendant are same as those shown me.

Cross Examination. Altogether we sold defendant 5 cars of bottles; there are 144 bottles in a gross; this would be 4 or 5¢ a bottle for quarts, 2 or 3¢ for pints, and pretty nearly 2¢ for half pints.

Frank Shoaf. Live in Yadkin County; 9 or 10 miles from Williams; run a cooper shop in 1904; sold the defendant kegs; commenced with them 12 months ago; have not been selling regularly; something like 25 or 50 sometimes, and sometimes as low as 11; took 76 one time; delivered every three or four weeks; don't recollect how many; when I commenced they paid 50¢ per keg until just before Christmas, and then 55¢. Kegs held 4¾ gallons each; iron hoops; delivered these kegs at the rectifying plant of the defendant; always got checks for kegs; delivered to me by Stevenson or Kennedy; sold Old Nick Williams Company; Kennedy was there in rectifying house; sometimes drawing off whiskey at the rectifier; saw Ike Hutchens and a man named House and others working there; never counted the number.
(122)

Isaac Baitty. Live in Yadkin County; manfacturer of barrels and kegs. Sold the defendant corporation about 150 or 200 kegs 8 or 10 months ago. Delivered all within a couple of months to Mr. Williams at the rectifying house. Paid me 50¢ per keg. Kegs held from 4½ to 4¾ gallons.

J. M. Craver. Live in Yadkin County. Sold the defendant corporation 150 kegs, I suppose, holding 4¼ to 4¾ gallons, about a year or year and a half ago. Paid me 50¢ per keg.

A. M. CHAMBLEY. Live near Marshall, N. C. Have been deputy collector and worked in Collector's office at Asheville for six years prior to this time. Yadkin County is in that district. I had charge of records 39 and 41 since July, 1903. Upon this book is entered the returns of spirits gauged and dumped and gauged and stamped. The records used in connection with this book are Forms 122 and 237; 122 is the application made by the rectifier to dump and the Collector's order for gauger and the Collector's return of spirits gauged and dumped. Record 39 contains any records of the work of The Old Nick Williams Company. I began to make this record July 1, 1904. Have one preceding that date back to July 1, 1902, and to June 30, 1904. Document handed me by District Attorney is Form 11 of The Old Nick Williams Co. dated June 29, 1903, and is application for special tax stamps, and is on file in the Collector's office. I usually wrote the records with form 27 B and turned them over to the cashier, who issued the stamps. This paper introduced in evidence by the government and marked and identified as Exhibit 2.

Form 11, application for rectifier's license, beginning July
(123) 1, 1904, of The Old Nick Williams Co., now handed me by the District Attorney, is on file in the Collector's office, and is hereby introduced in evidence marked and identified as Exhibit 3.

Form 27 B, now handed me by the District Attorney, is the rectifier's notice of the intention to carry on the business of The Old Nick Williams Co., incorporated, and identified by me, introduced in evidence and marked Exhibit 4.

Form 52 A, handed me by the District Attorney, purports to be a return of The Old Nick Williams Co. for the month of July, 1903, and is on file in the Collector's office, and is now identified by me, introduced in evidence and marked Exhibit 5.

52 A is on one side of this form and 52 B on the other. 52 A is a record of the purchases; 52 B of the sales. I identify Forms 52 A & B of The Old Nick Williams Co., now handed me by the District Attorney, signed by N. Glenn Williams, for the month of June, 1903, and on file in the Collector's office, and now marked Exhibit 6, and introduced in evidence.

Papers now handed me by the District Attorney I hereby identify as 52 A & B for the months of August, September, October and November, 1903, of The Old Nick Williams Co., signed by N. Glenn Williams, President, as being on file in the Collector's office. Said papers are marked Exhibit 7, and introduced in evidence.

I now identify forms 52 A & B made out by The Old Nick Williams Co., covering the period from January, 1904,

up to and including July, 1904, as being on file in the Collector's office. Said papers are marked Exhibit 8, and introduced in evidence.

I now identify Forms 52 A & B of The Old Nick Williams Co. for the month of July, 1904, up to and including March 5, 1905, as being on file in the Collector's office. Said forms are hereby marked Exhibit 9 and introduced in evi-
(124) dence.

I hereby identify Form 52 A of The Old Nick Williams Co. from January, 1904, up to and including March, 1905, as being on file in the Collector's office. Said forms now marked Exhibit 10, and introduced in evidence.

I now identify Wholesale Liquor Dealers' record of The Old Nick Williams Co., covering the period from June 30, 1903, up to and including April 22, 1905, which are marked Exhibits 11 A, 11 B and 11 C, and now introduced in evidence.

I now identify Gauger's Record No. 64 of The Old Nick Williams Co., which record is marked Exhibit 12, and introduced in evidence.

I hereby identify Forms 237, Gauger's report of whiskey gauged out for the months of August, September, October and November, from the rectifying establishment of The Old Nick Williams Co. as being on file in the Collector's office, which forms are here introduced in evidence and marked Exhibit 13.

I hereby identify Forms 122 of The Old Nick Williams Co. for August, September and November, 1903, which forms are now introduced in evidence and marked Exhibit 14.

I hereby identify Forms 122 of The Old Nick Williams Co. for the month of December, 1903, which form is here introduced in evidence, marked Exhibit 15.

I hereby identify Form 237 of The Old Nick Williams Co., which is now introduced in evidence and marked Exhibit 16.

I hereby identify Forms 338 of The Old Nick Williams Co. from July, 1903, up to and including May, 1905. These forms introduced in evidence, marked Exhibit 17.

I hereby identify Forms 45 of The Old Nick Williams
(125) Co. from July 1, 1903, up to and including April, 1905. Those for August, September, October and March excepted. These forms now introduced in evidence and are marked Exhibit 18.

I hereby identify Forms 27 A. D. E. Kenedy, Distillery No. 3, dated February 5, 1904, and May 2*m*, 1904. Said forms being here introduced in evidence and marked Exhibit 19.

I hereby identify Survey of the Distillery No. 3, D. E.

Kenedy, dated February 2, 1904. Said survey here introduced in evidence and marked Exhibit 20.

I hereby identify bond of D. E. Kenedy, approved March 22, 1904, and May 22*m*, 1904, here introduced in evidence and marked Exhibit 21.

I hereby identify registry of the stills, Form No. 26, dated April 20, 1904. Here introduced in evidence and marked Exhibit 22.

I here identify Form 14, Distiller's Monthly Returns from March, 1904, up to and including April, 1905. Said forms here introduced in evidence and marked Exhibit 23.

I identify Distiller's books Nos. 12 and 28 of D. E. Kenedy. These books introduced in evidence and marked Exhibit 24.

I identify two forms 13 marked Exhibit 25. Forms 25 marked Exhibit 26. Forms 52 C marked Exhibit 27. Forms 370 marked Exhibit 28. Said Exhibits 25, 26, 27 and 28 are all here introduced in evidence.

(126)

(Cross Examination). The Old Nick Williams Co. was a licensed rectifier and wholesale liquor dealer, as well as a retail liquor dealer; that is, it had paid the special tax to carry on the three separate businesses. Form 45 is Rectifier's monthly return, which shows the quantity of spirits received for rectification during the preceding month—the number of packages and the wine and proof gallons, the quantity dumped, the spirits rectified and removed, and from whom they were received. The Old Nick Williams Co. made these monthly returns regularly, and they are now filed in the Collector's office.

Form 237 is the gauger's report of the spirits gauged and stamped. It also gives the number of rectifier's stamps placed on each package wine gallon and proof gallon, and the number of stamps.

Form 338 is the form on which wholesale liquor dealers should give the amount of spirits on hand on the first of the month, the amount received during the month, the amount sold, and the amount remaining on hand. The two must add up and make the same—a recapitulation of Forms 52 A & B. This the *the* form of the wholesale liquor dealers, and not for rectifiers, unless they are also wholesale liquor dealers.

Forms 122 are applications to dump made by the rectifier, on which he describes the packages which he has on hand to dump, and contains the order of the gauger to gauge it and also the gauger's return. The gauger re-gauges these packages, and the result is hardly ever what is reported by the rectifier. There is possibly less than a gallon's difference, which is called a

"wantage." The Collector's office would compare the returns of the gauger with the statement of the rectifier to see if they corresponded, and any discrepancy discovered would be called (127) to the attention of the rectifier. These reports passed through my hands and were examined and found correct. I handled all of them from the 1st of July, 1904, until last month. The information contained in these various reports of which I have spoken is kept on file in the Collector's office, so that the Department has information of the matters contained in them. We went over these reports the other day, examined these forms 122 and 45, &c., and compared them with the books of The Old Nick Williams Co. and found that the information omitted from Forms 52 A & B as to the spirits received for rectification was contained in other reports, namely, Forms 122, 237, and 45, both as to packages, kind and number of stamps, wine gallons and proof gallons.

J. D. Baker. Live in Montgomery, Ala. Bought a few cases of whiskey from the defendant corporation, 23 in all. Paid for the same by draft, which I took up. Bought 4½ gallons in a keg and I got 2 kegs at a time. Suppose it was about 100% corn liquor. Had no understanding about the proof. I think it was about 90% or 100%; paid $11.25 for the two kegs and the freight. Bought 2 cases of apple brandy, 1 dozen to the case, quarts. Also a drum of whiskey containing 30 quarts. 18 quarts of apple brandy and 12 quarts of peach brandy in the drum. This in July, 1904. Bought the other in 1904 and 1905. I paid at the rates of $1.25 per gallon for the stuff. Don't know what proof it was. It was fairly good corn. I guess I paid about the market price for it.

R. L. Altmayer. Live in Macon, Ga. Wholesale and retail dealer. On Feb. 22, 1905, I bought of W. H. Woodard, agent of the defendant corporation, 100 cases quarts corn whis-(128) key; proof 100%, 80%, 95% and 90%. For the 100% I paid $4.10; for the 80%, $3.50; 95%, $3.95, and the 90%, $3.80.

W. B. Sellers. Live in Greensboro, North Carolina. Was employed as travelling salesman for the defendant corporation from 7th December, 1904, to March 1, 1905. Went into the rectifying house at Williams. Saw three or four hands bottling. The Prince goods, 90%, I think, sold at 30¢ quart. Sold it in cases of 3 gallons each. It was $3.60 per case. Impossible for me to tell how much I sold of this brand. Sold Mr. Farmer the bill he spoke of this morning. Mr. Williams

insisted on my selling his best grades. Sold some barrel goods, 100%, at $1.35; 90% at $1.25. Sold some every day while I was going. Cannot say how much. Got $60 a month and expenses for my services.

Cross Examined. Got about the market price for the goods I sold; that is, as much as other goods of the same grade were being sold for by other houses. (It is admitted that Forms 338 are signed by D. E. Kenedy, and Forms 52 A & B, Exhibit 8, are genuine. The signatures on Forms 45 are in the handwriting of the persons purporting to have signed them. Wherever the signature of N. Glenn Williams as president appears thereon, it is his genuine signature. In Government's Exhibit 6 the signature of N. Glenn Williams is admitted to be in his handwriting.)

P. L. Farriss. I was employed by the refendant corporation first about November 20, 1904. Travelled for the company on the road; salary $50 per month and expenses. Travelled principally in West Virginia. Sold high grade goods. Have no memoranda of what I sold. Sold some goods at Mar-
(129) tinsville, Va., to the Martinsville Dispensary, 5 cases 3 gallons in the case. Sold several small bills at Roanoke, three or four probably, something like 5 cases in bill. Sold 25 cases at Bristol, Va. Sold some small bills at Bluefield. Went to Conover, W. Va., and made about all the towns that sold whiskey. Cannot recall the size of the orders. All small ones, 5 or 10 case orders. Largest order I sold was 25 cases. Have no idea how many gallons of whiskey I sold during the two months I was on the road, not very much. The prices were a litttle higher than goods were being had for from other concerns in that section, said to be the same class of goods. Came in about the 20th of January. After I returned from my trip I remained with the corporation in the same position filled by Mr. Stevenson. Went in the office about the 20th of January. Mr. Kennedy had charge of the rectifying all the time I was there. I remained until the 26th of August, 1905. Mr. Kennedy had hands under him in the rectifier, don't know who they were. Know Tom Ratledge was one. I think he is a carpenter by trade; *to* did carpenter work, making boxes. Mr. LeGrand was another. Those are about the only men I know. Think probably I would know Nick Hutchens. Had three stenographers and a book-keeper in the office. All ladies. Saw some colored men about there. One was named John Hardin; Wesley Lyons was another, Frank Miller another. (He was at the distillery, don't know who paid him.) I sometimes

gave him a check of the company. John Hardin drove a wagon. I filled up checks for the company to pay the Collector of the district for taxes on withdrawal of spirits from the distillery warehouse of D. E. Kennedy. Don't remember the amounts. They were small checks of the company payable (130) to D. E. Kennedy. Cannot tell you the amount; less than $100. I had charge of the correspondence. All letters written by me were marked dictated by F. I remember sales of whiskey made to R. E. Garner. I was clerk for the company. Suppose I was authorized to answer the letters and ship the goods. I attended to the correspondence and the office work, answering letters, making out bills of lading, and such other work as was connected with the shipments; gave directions as to shipping, &c. When I received and order I would take it or send it to the rectifying house, and they would fill it and bring it back to me, and then the correspondence would follow. I think I had authority to accept or reject orders from customers. I settled these matters and fixed the prices. These letters, bills of lading and the invoices were all made out by me, and show sales made to Mr. Garner as follows: Feb. 4, 1905, 2 barrels apple brandy, price $1.60 per gallon; March 30, 1905, 1 barrel 70% corn, 3 barrels 85% corn at $1 and $1.15 respectively; Feb. 18, 1905, 5 barrels 85% corn at $1.45; Apr. 18/05, 3 barrels 85% corn at $1.15; March 9, 1905, 4 barrels 70% corn at $1; March 10, 4 barrels 85% corn at $1.15; Apr. 14, 1905, 5 barrels 85% corn at $1.15; April 7, 1905, 5 barrels 75% corn at $1.05; April 11, 1905, 5 barrels 75% corn at $1.15. The bills of lading show that these goods were shipped in accordance with these orders, and when we sent a bill of lading to a man we shipped the goods. Mr. Garner's checks for these goods are endorsed Old Nick Williams Co. in the handwriting of Mr. Williams. I identify bills of lading and drafts made out by me for following shipments: April 26, 1905, Franklin Distillery, 5 cases quarts, 6-year old corn, $6; 5 cases pints at $6.25; April 11, 1905, 25 (131) cases half pints, 6-year old corn, $6.50 per case; Feb. 14, 1905, 1 case each of quarts, pints and half pints at $6, $6.25 and $6.50 per case; March 24, 1905, 10 cases half pints, $65; 3 cases pints, $18.75; 2 cases quarts, $12; March 7, 1905, 5 cases half pints, $6.50 each; 2 cases pints, $6.25 each. I also sold the following invoices: March 23, 1905, Pulock Dispensary, Pulock, Va., 10 cases pints, $65.50; 5 cases half pints, $35; April 27, 1905, 5 cases quarts Prince 70%, $3.30 per case; 10 cases pints, $3.35 per case; 10 half pints, $3.30; April 20, 1905, 5 cases quarts, $6 per case; 5 pints, $6; 5 half pints, $6.

Letters, Exhibits 31, 32, 33, 34, 35 and 36, all identified by the witness and introduced in evidence. (The clerk will here copy in full Exhibits 31, 32, 33, 34, 35 and 36, inclusive, being the same introduced in evidence upon the trial, which are here incorporated into and hereby made a part of this bill of exceptions.) These letters were dictated by me to a stenographer.

Cross Examined. The goods I sold for the defendant company while I was on the road were above the market price for similar goods, as I was informed by my customers. The bottles were never filled quite up to the stopper, very seldom that they were filled up into the neck. Done in order to prevent bottles bursting in shipment. In carrying on the correspondence for the defendant company. I had no particular instructions as to how to carry it on, but used my best judgment in that particular. In accepting orders for shipment of goods I used my judgment in nearly every instance. In fixing the prices for shipments as testified to by me as having been made under my direction, I fixed them above the ordinary market price for similar goods?

(132)

B. F. Jones. Live in Yadkin County, for 40 years. Know where the town of Williams is located and the distillery of D. E. Kennedy is operated. Was there last August. Was tax assessor for my township in June, 1904. Went to the distillery of D. E. Kennedy to list his property. He listed his poll and his personal property amounting to $400. He listed his distillery, but did not want much to list that after I told him I thought he *out* to do it. I told him somebody must list the distillery. He said he did not know about that, and would have to see Mr. Williams, and would send it later. He sent up a list of the distillery afterwards. The whiskey was in the warehouse. Said he had a deed to the distillery. District Attorney offers in evidence certified copy of a deed from the office of the Register of Deeds of Yadkin County for the transfer of 47 acres and 2 58/100 acres of land from N. Glenn Williams and wife to The Old Nick Williams Co., dated Feb. 1, 1904, conveying the premises described in the deed from Old Nick Williams Company to D. E. Kennedy, and also the lands upon which the rectifier was located.

Cross Examined. Mr. Kennedy said he did not want to list the distilled spirits until he saw Mr. Williams; did not understand how to list it. We have a peculiar method of listing distilled spirits. It is agreed by the assessors pretty much all

over the country that whiskey in bond does not really belong to the distiller until the tax was paid. The tax was not paid on Kennedy's whiskey, and I told him it was generally listed (133) at 15¢ per gallon. $1.25 was as much as you could get for it and the government tax for $1.10. After I got through with the personal property I asked him about the real estate. I saw his name up over the distillery door and told him he would have to list it, and he told me he had a deed for the property, and thereupon listed it, and swore to his return.

H. B. PLUMMER. Live in Warrenton, N. C. Manager of the Warren County Dispensary in 1904. Bought 230 gallons of whiskey from the defendant corporation in cases, quarts, pints and half pints; 6-year old corn whiskey; paid $6 per case or $2 a gallon, which was the full market price.

M. C. CUTTER. Live in Washington, N. C. In saloon business in 1904 and 1905. In the spring of 1904 bought 30 cases of corn liquor from the defendant company, quarts, 6-year old, 90%, $4.90 per case.

E. G. BUTLER. Live in Henderson, N. C. Book-keeper and secretary of the dispensary in 1904 and 1905. Bought 30 barrels of corn whiskey, 33 cases of corn whiskey, 27 cases of apple brandy from the defendant company. Paid $1.12 for the corn whiskey in barrels, 85%. Paid average of $1.88 for quarts, pints and half pints in cases. Paid $2.02 per gallon for the apple brandy.

Cross Examined. These prices were the full market prices for similar goods.

W. W. HORNE. Live in Fayetteville. Druggist. Lived there in 1904 and 1905. Bought corn whiskey in cases from the defendant company. Something over 100 cases, quarts and pints. This prior to April, 1905.
(134)

G. S. WILSON. In 1904 was Manager of the Smithfield dispensary. In May of that year bought from the defendant company 1 bbl. of corn whiskey, 90%, 1 bbl. straw color whiskey, 90%, at $1.17 per gallon; May 31, 1904, 2 bbls. 90%, corn whiskey at $1.17 per gallon; August 3, 1904, 2 bbls. 90%, corn whiskey at $1.17 per gallon; June 3, 1904, 2 bbls. straw colored corn whiskey, $1.12 per gallon; August 17, 3 bbls., 90%, corn whiskey at $1.17 per gallon; October 20, 1904, 6 bbls., 90%, corn whiskey at $1.22 per gallon; October 24,

1904, 4 bbls., 90%, corn whiskey at $1.22 per gallon; January 3, 1905, 2 cases, quarts, corn whiskey at $4.90 per case; 2 cases, pints, whiskey at $5.15 per case; 2 cases, half pints, whiskey at $5.40 per case; February 10, 1905, 6 bbls. corn whiskey, 90%, at $1.25 per gallon.

G. S. WILSON (cross examination). The average price that I paid for this whiskey was equal to if not greater than the market price of similar goods at that time.

I. Q. POOLE. Live at Clayton, N. C. Manager of Clayton dispensary. Bought a little stuff from the defendant corporation in 1904 and 1905. December 2, 1904, bought 2 cases of corn whiskey, labeled Jolly Boy, *s* cases of pints and 2 cases of half pints at $5.50 per case; January 16, 1905, 10 cases of half pints at $4.10 per case, 10 cases of pints at $3.85 per case and 6 cases of quarts at $3.60 per case. Proof was 80%. March 4, 1905, 1 bbl., 90%, white corn whiskey at $1.30 per gallon; May 17, 1905, 3 bbls., 80%, white corn whiskey at $1.10 per gallon.

I. Q. POOLE (cross examination). Yes, I think I paid full market price for these goods.

W. M. MULLICE. Live in Albany, Ga. In whiskey business with the Albany Whiskey Company. Bought whiskey (135) from the defendant corporation in 1904. Probably one barrel and some keg whiskey. Paid $1.30 per gallon. Got two kegs at a time, and the company drew on me for the amount $4.50 per keg. Suppose it contained less than 5 gallons. Ordered more kegs than I got. Went to the station for the other kegs, but they were not there. Never saw them at the station or anywhere else. Can't say that we ever got any drafts for those shipments that were not delivered. Did not contract for any certain number of kegs. Was looking for two a day. No specified time. Don't know how many were delivered.

W. M. MULLICE (cross examination). Do not know the proof of the whiskey I bought. Paid full market price for the goods. Don't know about the kegs. Never bought any anywhere else.

ANDERSON WILLIAMS. Live 2 miles from Williams. Know Frank Miller, John Hardin, Albert Lyons and Frank Freeze. Have seen them all working as day laborers for Mr. Williams, driving teams from Williams to Clemons and doing

other work. Could not tell what they hauled. Sometimes bags, grain and other things. Have seen Mr. Kennedy several times about the rectifying house, but not the still house. Suppose the teams that they were driving belonged to Mr. Williams.

S. H. Bailey. Live at Opelika, Ala. Engaged in the sale of whiskey in 1904 and 1905. Bought some keg goods from defendant company last year, some case goods this year. Bought 15 or 20 kegs that held 4½ gallons each. Paid about $1.15 per gallon. Got two at a time every two or three days. In April, 1905, bought 50 cases .... proof whiskey—supposed to be, did not proof it. Bought it in quart bottles. Think they were Bourbon bottles. Think I paid full market price for this stuff.

(136)

J. Herman. Live at Macon, Ga. In whiskey business; book-keeper for Beddingfield and Company. Bought some goods from the defendant company during the years 1903 and 1904. It amounted in all to 143 cases, 3 gallons to the case, quarts, pints and half pints.

J. Herman (cross examination). Paid for the six-year old corn $6 per case and for the other $4.50 per case. This was the full market price for goods of that character.

J. H. Cassell. Live in Albany, Ga. In whiskey and grocery business. Bought barrel goods from the defendant corporation, 747 gallons in all. Most of it 80%. Paid $1.70 per gallon for 80%. Don't remember what I paid for 100%. This January 5, 1904.

Francis Stevenson (recalled). When Mr. Williams withdrew his spirits from his barrels he used a syphon as long as he could when the barrel was lying on the floor. Then he would turn it up on its end and let it run out at the bung. Could not pour it all out this way, sometimes would lack 5 gallons perhaps. He emptied every barrel he drew from in that way. The barrels were then turned down on the floor with the remainder of the whiskey in them. When he went back next day to withdraw whiskey he began on full barrels as far as I know. Got up all of his goods that way every other day about. Shipped three loads a week. Might draw out of as many as four barrels a day. One hundred fifty gallons was a load. I was there four weeks. A boy named John hauled the whiskey away. Ran two teams one day, with the exception of that day John hauled it all.

FRANCIS STEVENSON (cross examination). I went there August 3, 1903. When the company would receive an order for different kinds of whiskey the order would be filled from (137) the barrel that contained that kind of whiskey I suppose, and in filling the order they would not get all of the whiskey out of the same barrel, but would draw no more out of a barrel than was necessary to fill the order.

T. W. CRAFT. Live at Louisville, Ky.; am book-keeper for Southern Malting Company. Made sales of grain and malt to the defendant company as follows: Feb. 29, 1904, 503 bus. of corn at 71 cents; 103 bus. rye at 99 cents; 103 bus. barley at 71 cents; March 1, 1904, 504 bus. of mixed corn at 71 cents; 96 bus. of rye at 99 cents; 36 sacks of barley malt, 100 bus. at 71 cents; March 23, 1904, 690 bus. of barley malt at 68 cents; April 14, 1904, 442 bus. of barley malt at 70½ cents; May 18, 1904, 143 bus. of barley malt at 70½ cents; Mch. 15, 1905, 509 bus. of corn at 65 cents; May 12, 1905, 1 bag yeast malt (90 pounds), 70½ cents. One of these shipments was made after April 22, 1905. Received a letter from the defendant company dated September 29, 1904; also one dated June 10, 1904. We received pay for all of these shipments. Collected it by sight draft with bill of lading attached.

NICK HUTCHINS. Live in Yadkin. Worked for Old Nick Williams Company off and on for last two years. Was there in July two years ago. First work I did was at the rectifier, then worked at the distillery. Did carpentry work. Made boxes at the rectifier, cases to pack whiskey in somewhat like the one on the floor there. A man could saw his timber and make 25 of those boxes a day. They contained 12 quarts or 24 pints. Mr. Rutledge and several others worked there at the same business. We worked together both on the building and at the box shop. The company paid me, that is, N. Glenn Williams did. Saw Mr. Kennedy there. Came in the winter or fall of 1903 some time. I think he worked in the rectifier. (138) I guess he has been working there ever since he went to Williams. I have not been there since last July. I think John Hardin, Albert Lyons and Gus worked there when I did; drove teams. Some hauled wood at the house and the distillery, saw them haul it at the distillery once in a while. I worked a little in the bottling department of the rectifier. Corked and labeled bottles something like those on the floor, also nailed up cases in the packing room, 12 quart and 24 pint cases. Also kegs. Made some boxes for kegs. They would take a barrel of whiskey out of the rectifier and pull it up with ropes to the

bottling machine and pour it into that. Also seen them take water up in the rectifier, pulled up in the same way by a windlass to the top of the rectifying tub on the second floor I guess. Frank Miller fired the distillery.

A. J. KLUTTZ. Live at Greensboro; am a druggist; was in the business in 1904 and 1905. We had four shipments of whiskey from the defendant company, January 31, February 14, March 3, and June 1. January, $25.17 for case goods. Paid $6 a case for quarts, $6.50 for pints and $6.75 for half pints; February 24 paid $62; March 3 paid $73. I suppose that must have been 11 cases or perhaps 12. I think the price we paid for this goods was the full market price of whiskey of that kind and character.

(139)

W. S. CANTEY. Live in Atlanta; Deputy Collector in that District; saw the boxes exhibited in court in Atlanta; wrote my name upon them, so I could identify them, and expressed them here last Friday; got them from the Southern R. R. Agent; they had been seized by Deputy Collector Serber, who turned them over to me; these boxes were claimed and bonded both of them by the defendant company; got them last June, I think.

T. J. GALLOWAY. Live in Nashville, Tenn.; Deputy Internal Revenue Collector last March; was in town of Jackson about that time; found 26 packages of corn whiskey in the railroad depot there; 23 kegs and 3 jugs containing 4½ gallons each; I took the proof of the spirits in those packages; one was 86%, two 88% and the remainder 80; they were consigned to J. R. Smith, Jackson, Tenn.; he is a retail liquor dealer.

J. L. HATCH. Live in Spencer now; in Winston last spring; prior to three months ago had been for seven years employed by the Southern Railway Co. at Winston, adjusting city claims; made one trip to Mr. Williams to see him on this business last April; saw Mr. Sams and Mr. Sheeks out there; also Mr. Williams; after I got through with my business with him I told him I would be glad to see his distillery. He said the distillery was not right near the house, but he would have a man to show me over the distillery. Mr. Kennedy was afterward introduced to me and showed me through it. He told me it was the most up-to-date distillery in the South. Frank Miller was firing; I have seen him at the Winston depot with the team a number of

(140) times, unloading boxes from the wagon he was driving; this was July, 1903; these boxes appeared to be similar to the boxes before me and pointed out by the District Attorney.

Cross Examination. I am now employed by the Southern Railway Co., also employed by the Government in this case, getting $5.00 a day and expenses from the Government.

WM. MCGIBBONEY. Worked in Winston in 1903 for the Southern Railway Co.; helped the delivery clerk; know Frank Miller; he used to come to the depot pretty often, hauling loads of boxes; something like these sitting down there on the floor; they were marked and addressed to people they were going to; brought seven or eight different boxes going to different points; the highest I ever saw him bring at a load was 10, 12 or 15; missed him about 12 months ago; before that he used to come every day or every other day.

T. O. STOUT. Live in Indianapolis, Ind.; was engaged in the whiskey business in 1904; bought corn whiskey and some apple brandy from the defendant company; got it in jugs; ordered 2 barrels, and they sent me them in jugs; first in 60 one-gallon jugs, 6 in a case, 10 cases of it; paid $1.25 per gallon; it was hundred proof whiskey; a bill of 5 cases of bottled goods they shipped me I did not keep; on Oct. 5th they shipped me 6 cases, 6 gallons each, hundred proof new apple brandy at $1.60 per gallon; another shipment 23rd Nov. of whiskey; I think was 20 kegs at $1.23 per gallon; hundred proof whiskey. I received letter from the company dated August 18th, 1904; in re-
(141) sponse to the letter I wrote them to ship me two barrels of pure North Carolina white corn whiskey and for prices on new apple brandy. They answered back, giving the prices of the brandy. Letter dated Aug. 18, 1904, read in evidence by the District Attorney, indicating that he could sell his brandy; that he could not sell it in barrels, but would sell it to him in kegs less than five gallons.

M. KAUFMAN. Live in Atlanta; am with Bluethenthal & Bickart, wholesale liquor dealers; purchased from the defendant company April 25, 1904, 10 barrels hundred proof North Carolina corn 476.33 gallons at $1.25 per gallon; April 30th, 10 barrels hundred proof corn, 479.39 gallons, at $1.25; that is all. We generally calculate it costs about 30¢ a gallon to put up case goods in Atlanta.

Cross Examination. Don't pretend to tell the Court what it ought to cost the defendant company in Yadkin County; only know where I have done business; I paid for the whiskey I bought from the defendant company the market price as well as I remember for similar goods.

SIG. SAMUELS. Live in Atlanta; engaged in the retail and wholesale liquor business; bought whiskey from the defendant company from Mr. Woodard, his traveling salesman; in March, 1904; bought a thousand cases to be delivered as we needed it; at $3.50 for #8 and $3.75 for #9 per case; don't know what proof it was; there was only 350 cases delivered under this contract; delivery was made in March, 1904; whiskey was put up in quarts; without label; I believe several other shipments were (142) made but were seized by Mr. Gates, the Special Internal Revenue Agent; I think he got three or four shipments; one shipment he seized out of the house.

Cross Examination. This whiskey was low proof goods; the same class of goods was sold on the same basis by other people; don't know for what reason it was seized.

W. T. WOMACK. Live in Macon, Ga.; purchased one invoice from the defendant company; March 14, 1904, had 5 transactions in all; bought 2 4½ gallon kegs each time; eighty and ninety proof; paid $1.15 for the ninety and $1.05 for the eighty proof; I did not return the kegs, but contract was that they were to be returned; I paid for this whiskey the prevailing market price at the time.

J. R. SMITH. Live in Jackson, Tenn.; in saloon business; purchased whiskey from the defendant company in 1904; through Mr. McElwee, its travelling salesman; goods were shipped, bill of lading with draft attached; along through the month of November; in kegs; I was to pay $1.10 per gallon; it was ninety proof; received 14 kegs in all, and took up the drafts for same; bought some case goods; 5 cases at one time and 10 at another; paid $7.50 per case; 3 gallons in case; some keg goods were shipped in my name to depot that I did not take out; draft was presented to me for 26 kegs, I think; I was told that these kegs were seized by Revenue Agent Galloway.

Cross Examination. I don't know whether Mr. Galloway seized these goods for valid or invalid reasons; paid as high as $2.50 per gallon for some of the goods I received; for the rest I paid $1.10 and $1.16; ninety proof goods; I think this grade (143) of goods at that time was worth $1.18 or $1.20, varying; I paid about market price.

T. J. GALLOWAY (recalled). I seized the goods referred to by the last witness the 4th of March; had a conversation with Mr. Smith; never had any conversation with him about any

other goods; that is the lot of goods I testified to on yesterday that I proofed.

T. C. Baxter. Live in Jackson, Tenn.; retail liquor business in 1904; bought some whiskey from the defendant company; Dec. 2, 1904, 5 barrels corn whiskey, 60 proof, 92¢ per gallon; 10 barrels, eighty proof, $1.12 per gallon; Nov. 5th, 3 cases 5-year old corn, $5.40 per case; 1 case Jolly Boy, $4.75; Nov. 5th, 5 barrels 80% corn, $1.12 per gallon; Aug. 27th, 5 barrels, 80% corn, $1.10 per gallon; July 16th, 2 barrels 80% corn, $1.10; 1 barrel white corn, $1.10; same proof; April 12th, 1 barrel 80 corn, $1.10; Oct. 18th, 5 barrels 80 corn, $1.12; Nov. 4th, 2 barrels hundred corn, $1.32; that's all; about 50¢ reduction on each barrel; bought some spirits as low as sixty proof; 40% of it was water; nearly one half, for which I paid 92¢ a gallon; at that rate if it had been a hundred proof it would have cost $1.80 per gallon; I bought 31 barrels and 4 cases in all; most of it low proof, 80 and 60%; the eighty proof whiskey at $1.12 would be $1.40 per gallon if standard proof.

A. T. Aiken. Live in Jackson, Tenn.; wholesale and retail liquor business; bought whiskey from the defendant company in jugs, boxes and crates; 80 gallons, I think; paid $1.05; low proof whiskey; couldn't tell how low; put up 4 jugs in the box; this was July, 1904.

(144)

Cross Examination. I paid the usual market price for similar grades of goods.

(145)

Harry Nissen. Live in Winston-Salem. Deputy Collector of Internal Revenue. In 1904 and since then. Issue stamps for spirits in the warehouse to D. E. Kennedy during that time as follows:

April 28, $1,103.
April 29, $479.01.
May 3, $983.08.
May 11, $482.07.
May 14, $477.04.
June ——, $466.01.
June 14, $467.06.
June 22, $466.04.
June 28, $1,178.06.
June 5, $178.69.
July 12, $913.07.
July 15, $933.04.

August 3, $463.06.
August 11, $477.
Aug. 13, $760.06.
August 22, $350.05.
" 25, $193.07.
Sept. 10, $528.04.
" 16, $471.04.
Oct. 11, $1,743.04.
Nov. 1, $674.06.
Oct. 5, $93.06.
November 23, $717.07.
December 7, $317.09.
(146) December 19, $955.05.
Feby. 27, $241.03.
March 2, $471.02.
March 9, $703.02.
March 30, $474.06.
Apl. 4, $492.01.

These were what is known as tax paid stamps which paid taxes for $1.10 per gallon of 100 proof spirits. These amounts were paid by checks drawn by the defendant company by N. Glenn Williams, President.

Cross Examination. Sometimes these amounts were paid by Mr. Blair, the cashier of the Winston bank. There was nothing unusual for the rectifier to advance money to the distiller to pay tax on withdrawals.

J. S. MINOR. Live in Louisville, Ky., architect and general contractor in the building of distilleries. Know how to operate distilleries. Name of the firm J. S. Minor & Son. Had dealings with The Old Nick Williams Co. July, 1903. Sold
(147) Mr. Williams a bill of machinery and appliances for distillery. Next saw him July 18. I went to Mr. Williams' house Monday morning previous to the 18th of July. Made written contract with him on that day. We did not contract to put up the entire plant, only to furnish him certain portions of the machinery. What we finally agreed upon was reduced to writing and signed by the parties. He said he wanted a first-class modern plant. I told him we could build him a No 1 first-class distillery, up to date, of any capacity, and make him 4½ gallons of whiskey to every bushel of corn measure, and offered to construct one of 101 bushels for $9,000. He did not accept this proposition. He thought he could do it better himself. We furnished him certain portions of machinery and ap-

pliances as set forth in our contract, which was reduced to writing.

After this contract was signed I saw Mr. Williams again on the 28th day of April, 1904, at his place of business. Had had correspondence with him previously. Have a letter dated first of March, 1904, concerning this matter. This letter offered in evidence by the District Attorney.

(148) Williams, N. C., March 4, 1904.

Messrs. J. S. Minor & Son,

Louisville, Ky.

Gentlemen:

This is to advise you that we are at a loss to understand the actions of your Mr. Cooley.

We have been looking for our distiller in any day since March 1st, and advised Cooley that we wished him to remain here and show the distiller through the machinery. He was aware of the fact that we were looking for the Distiller any day, but for some reason, unknown to us, he slipped off yesterday morning about day, walking.

If you can explain to us his action, we would thank you to do so by return mail.

Yours very truly,

THE OLD NICK WILLIAMS CO.,

By N. GLENN WILLIAMS, Prest. S.

When I saw him on the 29th of April he told me he wrote the letter. Mr. Colley was a man in our employ. Was there and left. He said he left and I asked him why he left, and I told him. I had reference to the letter when I was talking. The distiller referred to in this letter was Mr. William Johnson. He was there on the 28th of April, 1904, as yeast maker or distiller, running the distillery. Had known him for 25 or 30 years. Up to that time Mr. Williams had only paid $141 on the contract. He admitted at the distillery in the presence of Mr. Johnson and another party that the distillery was all right with the exception of the meal hopper and some other minor particulars. Said the hopper did not hold 100 bushels. Said he bought a hundred bushel hopper and wanted it to hold that amount. Said he has certain ideas about his distillery, and he wanted it that way. I told him we would send him free of charge a piece of steel that could be put on in a few minutes.

He asked Johnson if that would make it all right, and he said it would. I promised to correct some other minor defects, and asked him if there was anything else about his distillery deficient in our part, and he said no. I saw nothing else. His hopper was a standard size for 100 bushel capacity. Mr. Williams did (149) not raise any question about the producing capacity of the distillery. I asked Mr. Johnson in the presence of Mr. Williams what kind of distillery he had, and he said first class No. 1, up-to-date, everything running all right, just as nice as could be, making satisfactory runs. Mr. Williams said he owned the distillery and he wanted things fixed according to his ideas. When I was there in July, 1903, a few days before I closed the contract for the sale of the distillery—I got there about the middle of the day on Monday, and he said he could not talk to me, as he was looking for the revenue officers to come and seize his rectifying house. They came the next day. I saw somebody make a sign for someone to stop. My attention was called to it. I looked and saw a wagon behind the barn. It stood there some time. When I looked at it I saw two barrels of whiskey in it. It was put in a crib about 100 or 200 feet from the rectifier. I did not see any stamps on it. As I found the distillery on the 28th of April, 1904, it ought to produce from 4½ to 4 6/10 gallons for every bushel of meal used.

(150)

L. A. Kiser. Live at Kings Mountain, N. C.; got one package of spirits from the defendant company in January, 1904. One gallon old Nick, one-year old peach brandy, $2.50 per gallon, and one gallon six-year old corn, $2.50 per gallon. First received the invoice, but the goods did not come with it. Subsequently received the goods. I have the bill of lading for that shipment. The letters are in reference to the package not coming up.

Mr. Mixer recalled. In a conversation at the distillery on the 28th of April Mr. Williams said the company had been organized and a couple of gentlemen in New York, whose names I do not know, were to furnish money; that he was President of the company, and that it was not his fault that it was not paid, as these men had not furnished the money as promptly as he had expected. That he would pay a soon as he could get the money. That Mr. Blair, a banker at Winston, would take (151) the matter up with New York parties and get the money as soon as possible. I told him that he was running the distillery on my money, and that he had accepted it by running it for the several months, and we had furnished him everything

we had agreed to, and the distillery was running good, and he admitted that the distillery was running good.

Cross Examination. In reference to those two barrels of whiskey that I referred to on direct examination as having seen in July, 1903, put in the corn crib, I think this occurred on Tuesday before the date of the contract. Mr. Williams and I had gone to his house to eat dinner, and while there the revenue officers came. Mr. Pinnix was one of them. While I was there the wagon drove up and had in it two barrels of whiskey. I think Mr. Pinnix had done seized the rectifying plant. Don't remember what they were disputing about. Don't remember to having offered Mr. Pinnix any advise as to his duty with reference to the two barrels of whiskey. Don't remember having any conversation with Mr. Pinnix at all. Might have spoken to him, but don't recollect it. Heard Mr. Williams tell a couple of negroes to put the whiskey in the crib. Did not see Mr. Pinnix on the spot at the time. He might have been on the other side of the house. I did not see or look for any stamps (152) on these two barrels. Don't know whether they were stamped or not. I went to the distillery on yesterday and the day before with Col. Chapman and some other gentlemen to examine and test the capacity of the distillery. I suppose Mr. Williams was here attending court at the time we made the test. I was sent there by the District Attorney and Col. Chapman. Am not a government officer. Went to help investigate the distillery, and we did it.

Redirect Examination. I found the distillery was in the same condition, and with the same equipments that I put there and saw there in April, 1904. The only change that I noticed, we put three yeast tubs in the plant—one had been taken up. The whiskey tub had been taken out and a larger one put in. These changes did not affect the producing capacity of the distillery. It was capable of making no more and no less than the day we finished it.
(153)

E. E. Garner. Live in Andersen, Alabama. In liquor business there in 1904 and 1905. Bought considerable goods from defendant company in 1904, principally corn whiskey and apple brandy in barrels, cases and jugs. Bought on March 15, 5 bbls., 85%, at $1.15 per gallon; March .., 5 bbls., 90%, at $1.15 per gallon; June 3, 3 bbls., 85%, at $1.15 per gallon; April 25, 60 quarts 6-year old corn, $26.40; think that was 80%; April 25, 300 pints 6-year old corn, $69; 615 half pints 6-year old corn, $77; April 15, 120 quarts 6-year old corn,

$53.20; 96 pints 6-year old corn, $22.08; 192 half pints 6-year old corn, $23.24; June 3, 4 bbls., 70%, corn at $100; June 8, 5 bbls., 85%, corn at $1.15; June 23, 5 bbls., 85%, corn at $1.15; October 28, 8 cases corn, $64.80; September 3, 72 quarts apple brandy, $24.30; Oct. 25, 8 cases corn, $64.80; Oct. 27, 150 half pints corn, gratis; Oct. 26, 135 quarts apple brandy, $54; Nov. 2, 114 quarts jugs old corn, $48.60; Nov. 4, 8 cases corn, $64.80; Nov. 23, 144 quarts jugs corn, $48.60; Nov. 3, 8 cases corn, $64.80; Nov. 10, 1 case corn, gratis; Oct. 31, 12 bbls., 85%, corn at $1.15; Dec. 14, 8 bbls. corn, 85%, at $1.15; Jan. 17, 1905, 5 bbls. corn at $1.45; think proof was 85%; Nov. 4, 1904, 8 cases corn, $64.80; Jan. 3, 1905, 8 cases corn, $64.80; Jan. 12, 8 cases corn, $64.80; 12 bbls. corn, 85%, $559.23; Jan. 26, 8 cases corn, $64.80; Feb. 4, 2 bbls. brandy, $184.85, 80%; Feb. 6, 2 bbls. corn, 85%, at $1.15; Feb. 8, 20 cases corn, $95.10; 5 bbls. corn at $1.65; Mch. 20, 4 bbls. corn at $1.15; Mch. 30, 1 bbl., 70%, corn at $1.00; 3 bbls., 85%, straw at $1.15; Feb. 18, 5 bbls. corn at $1.45; April 18, 3 bbls. corn at $1.15; Mch. 7, 4 bbls. corn, 70%, at $1.00; Mch. 10, 4 bbls., 85%, corn at $1.15; April 14, 5 bbls., 85%, corn at $1.15; Mch. 7, 5 bbls., 75%, corn at $1.05; April 11, 11 bbls., 75% and 85%, corn, $583.43. These purchases were made between March 15, 1904, and April 11, 1905, 12 quarts to the case; 24 pints and 48 half pints, 3 gallons in a case.

(154)

E. E. Garner (cross examination). Would be 3 gallons in case if bottles were full. Ordinarily not quite full. I paid full market price for all the goods bought from the defendant company; more than I could have bought the goods for elsewhere.

William T. Johnson. Live in Louisville, Ky. Was in town of Williams in spring of 1904. Worked at distillery. Distillery had not been running before I went there. I started it up. Went in response to telegram from Mr. Williams. Said he wanted me to run the distillery for him. Paid me $3.50 and $4 per day. Mr. Stevenson paid my wages. He worked in Mr. Williams' office. Had a rectifier there also. Saw Mr. Kennedy there. He worked in the rectifier mostly. Distillery started at 101 bushels capacity. It could run at 80 bus. or at 21 bus. There were 4 80 bu. and 4 21 bu. tubs. You could run either set or both. Ran somethin*k* like two months every day. Ran on 101 bu. capacity three or four weeks, then reduced to 21 bu. I looked after the whole business; that is, making the yeast, the whiskey and all that. It is called a sour mash distillery.

Had a storekeeper and gauger. The storekeeper's business was to weigh up the malt. In making mash used 80% corn meal, 8% rye and 12% malt. Storekeeper's business to weigh up the material and look after the distillery. Gauger's business to measure and barrel the spirits at the cistern room. Fox was first storekeeper, and then Parker, Hendricks was Gauger. Weighed up material in meal hopper, from where it went into the mashing tub. Then it went to the fermenter. After it was fermented it went into the bear well, then into the still. This was a continuous process. Eight tubs or fermenters in the distillery, 14 chambered continuous still. Last saw the distillery yesterday. No change in its power to produce whiskey since I (155) last ran it. Frequently measured whiskey while I was operating distillery; after it ran into whiskey tank, but before it ran into whiskey room. Took a stick and measured it. I knew the inches and knew how much whisked I had. Measured very much in that tank. We took out the first whiskey tank and put in a larger one, because the first one would not hold all the whiskey. It was too small. Don't know how much it held. Can't say exactly how much we would make for a 101 bu. run. Did not make the same every day. Generally made a little over 4 gals. per bu., I guess. After I measured it I ran it into cistern room 200 yards away by way of a pipe; did not follow it to cistern room. Do not know how much they increased the size of the whiskey tub. Was there when Miner visited the distillery in 1904. Heard part of conversation between him and Williams. He asked me how I liked the distillery. I told him pretty well; that the runs were good and satisfactory in every respect. Mr. Williams said meal hopper had to be changed. Miner said he would send him a piece of steel to make it larger. Williams asked me if that would be all right. I told him yes. Mr. Williams came about just sometimes while I was there. Did nothing. Gave me no instructions. Left it all to me. I used regular jug yeast when I was there. My secret how I made it. Been in the business 26 years. That distillery ought to make four and one-half gallons to the bushel. Perfect house in every way.

William T. Johnson (cross examination). The quantity the yield of distilled spirits from the grain depends upon a great many things, such as the character of the corn, the condition of the atmosphere, the skill used in carrying on the process of distillation. A good distiller could make more than a poor distiller.

(156)

Geo. B. Ashcraft. Live in Jacksonville, Fla. Mana-

ger of G. Miller and Co., wholesale and retail liquor dealers. Bought 150 gals. 90% corn in February, 1905, in cases. Paid $3.30 per case for quarts, 75 cents more for pints and 75 cents more than that for half pints. Have had experience in bottling. Costs about 30 cents per gallon to bottle and crate, everything included except labor. Very little difference in cost between pints and half pints.

GEO. B. ASCHCRAFT (cross examination). I am talking about cost of bottling and crating in Jacksonville, Fla., don't know anything about cost of material or anything else in North Carolina. My personal experience was in my own place of business. Freight is cheaper in Jacksonville on account of water competition.

DAVID A. GATES. Live at Atlanta, Ga. Internal Revenue Agent with headquarters there. Been there since 6 Nov., 1899. Remember taking into possession from business house of Sig. Samuels some case goods in June last. Got 23 cases of a shipment of 25. Took proof of the whiskey and measured the bottles. Made a similar examination at A. Samuels' place of a similar shipment. The proof at Sig. Samuels was 90%, same at A. Samuels. Took charge of some of this goods and turned it over to witness Cantey, District Collector. Seized some at depot next day; three shipments from defendant company. Took proof of last seizure, was 80%. Cases marked No. 8 were 80%, cases marked 9 were 90%. Also seized cases consigned to the Pratt City Saloon Company. Found them in depot at Atlanta. Took a proof of it and turned it over to Cantey, the District Collector in charge of seized goods. My recollection is we seized 12 packages. Was 80%.

(157)

T. A. PEAKE. Live at Birmingham. Practical distiller for 35 years. Have examined distillery located in town of Williams spoken of in this trial, described by witness Johnson. Yesterday and day before looked over it hurriedly. In ordinary condition, in hands of competent man, with good grain, it ought to produce 4 to 4½ gallons per bushel standard proof. Col. Chapman, Mr. Jackson, Mr. Redmon, Mr. Johnson, and Mr. Miner were present when I made my examination.

T. A. PEAKE (cross examination). Quantity of distilled spirits produced from given amount of material varies sometimes a great deal.

HANSEL THOMAS. Live in Winston-Salem. Commission broker. Sold corn, rye and malt to defendant company. On March 17, 1904, for Strater Brothers, 600 bus. rye at 84½ cents; March 17, for O. B. Simpson, 1,200 bus. corn at 62¾ cents; April 15 for Strater Brothers, 600 bus. rye at 91 cents; March 24, for Southern Malting Company, 600 bus. malt at 68 cents; April 11, for Southern Malting Company, 18,000 pounds malt at 70½ cents; April 14, for O. B. Simpson, 1,200 bus. mixed corn, 68½ cents; April 15, for O. B. Simpson, 1,000 bus. mixed corn at 69½ cents; June 3, for Strater Brothers, 1,000 bus. corn at 69¼ cents; June 28, for Strater Brothers, 1 car mixed corn, price indistinct; Oct. 14, for W. H. Turner, 600 bus. rye at 1.01 per bu. Have no record of other sales in 1904 or 1905. This grain all delivered f. o. b. at Clemmons. Had transactions with defendant company principally over 'phone with Mr. Williams.

L. A. HEWITT. Am Secretary of Strater Brothers Grain Company of Louisville, Ky. Sold defendant company through Hansel Thomas between March 21, 1904, and Feb. 3, 1905, 4,000 bus. of corn ranging in price from 68¾ cents to 72¾ cents per bushel. Also 1,700 bus. rye ranging in price from 84½ (158) cents to $1.02½ cents per barrel. Received letter dated Dec. 28, 1903, from defendant company. (It is admitted that this letter is in the handwriting of Mr. Williams.) Letter offered in evidence.

THE OLD NICK WILLIAMS CO., Distillers.

Williams, N. C., 12/28/1903.

Mess. Strater Bros.,

Louisville, Ky.

Gentlemen:

We expect to use about one car load of grain every week week during the coming year, and want you to keep us quoted on Corn, Rye and Malt, delivered at Clemmonsville, N. C., and if you can make figures right, we will give you our trade.

Yours,

THE OLD NICK WILLIAMS CO.

(159)
L. A. Hewitt (cross examination),—A car of corn is recognized in the trade as containing anywhere from 500 to 1,200 bushels. If nothing is said we usually ship the largest quantity. Two of the shipments testified to are identical with those testified to by H. Thomas. First two that I mentioned.

W. S. Russell. Live at Gulf, Chatham county, since 1879. Bought some whiskey from the defendant company. Last order was Dec., 1903, bought some March, 1903. Received several months after I gave the order, some time in 1904. Two gallons in quantity. Shipped in two gallon jug.

J. F. Whisnant. Live at Henrietta Mills, N. C. Bought three gallons of whiskey from the defendant company in Dec., 1903. Shipped in jug. Never had any other transactions with that company.

Samuel Caudle. Live in Yadkin county, about one mile from Williams. Hauled wood for Mr. Williams about a year ago to still house. Located about a half a mile from his residence. No other still house right close. Hauled about 2 weeks. Wood came off of Mr. Williams' land. Hauled one load of corn from Clemmonsville to the distillery. Yates paid me. Gave my time in to him. Check from Old Nick Williams Company. Paid me five cents a bushel for hauling corn. Mr. Williams' wagons were hauling at the same time. John (160) Hardin, Wes Lyons, were two of the drivers. It is 8 miles from Williams to Clemmonsville. All of the corn was hauled to the still house. Have seen some of the same colored men hauling there that I saw hauling wood. Know Mr. Kennedy. Saw him at the rectifier.

(161) A. C. Hare. Live in Yadkin county, 8 miles from Williams. Sold the defendant company three loads of kegs, about 40 in a load. Mr. Kennedy gave me the company's check in payment, prices, 50¢ each.

Ed. X. Jackman. Live in Louisville, Ky., distiller for 30 years. Saw the distillery at Williams day before yesterday in company with Col. Chapman and others. The distillery should make about 4½ gallons to the bushel. Q. By District Attorney: Did you make a practical test of its capacity? Objection by defendants. Overruled. Exception. A. Yes, under the direction of Col. Chapman. Produced 5 70/100 gallons per bushel. Made 570 gallons from a run of 101 bushels.

Cross Examined: Went to the distillery at the request of the District Attorney and with Col. Chapman. Col. Chapman when we got there took charge. Examined around the place. Did the distilling under the direction of Mr. Redman and Col. Chapman.

G. Lee Redman. Live in Louisville, Ky. Was at the Williams distillery on the 1st and 2nd insts. with Col. Chapman, Mr. Jackman and others. Noticed the name over the door of the distillery. It was "D. C. Foster, Distillery No. 3, 5th District of N. C." Made examination under the direction of Col. Chapman. Had about 12 years experience in the revenue service. Been managing a distillery since January, 1904. The producing capacity of the distillery is about 4½ gallons of proof spirits to the bushel of grain when mashed in the same. A practical test made when we were there under Col. Chapman's direction. Q. By District Attorney: Just (162) tell how it was done? Objection by defendants. Overruled. Exception. A. Made test November 2nd. Distilled beer from two tubs, one of 80 and one of 20 bushels, 101 bushels in all. Produced 554 gallons from the 101 bushels. Saw the whiskey drawn off in the cistern room and measured by the gauger.

Cross Examined: When we got to the distillery Col. Chapman directed the examination, took practical charge. The test was made by Jackman, Johnson and Peake, under Col. Chapman's direction.

Wm. Johnson, Recalled: Was with Col. Chapman, Redman and others at the distillery when test was made referred to by last witness. Looked like there was too much meal in the tubs—some 30 bushels in excess of the 101 bushels allowed. When I operated this distillery the least quantity realized from a bushel of meal was 3 90/100 gallons. This about the first three days operated. After that made 4 gallons to the bushel. I measured it. First whiskey tank and distillery was not large enough to hold the amount of whiskey manufactured each day. I saw whiskey measured when test was made under Col. Chapman's direction. Q. By District Attorney: How much whiskey did they produce from the beer you took out of these tubs? Objection by defendants. Overruled. Exception. A. 11 barrels and another nearly full. Lacked 4 or 5 gallons. Barrels held 45 or 48 gallons.

T. C. McCoy: Visited the distillery at Williams when Col. Chapman was there and made the test. Got there in the night.

When I got there Mr. Nisson and Mr. Miner were in the distillery. They seemed to be guarding the distillery. I remained until morning. Went into the cistern room; saw whiskey tanks; Small amount of whiskey, suppose about an inch, or something like it, in the tank. I saw the product of the test weighed; 559 and a fraction gallons.

(163)

JACKMAN, Recalled: Examined the beer in the two tubs from which the test was made. Saw it had more meal in it than it should have. Remarked it would make between 5 and 6 gallons to the bushel, the day we got there. Made examination in probably half an hour after we arrived. Went into the cistern room on the morning before we began to make run. Gauger said all the whiskey had been drawn out of the tanks in the cistern room before we began to make run.

Mr. PEAKE. Recalled: Examined the beer casually, not critically. Looked like good beer. Like thick beer, but could not say how much meal it had in it. No means of telling. If anything had been put in this beer after we arrived and before test was made, it would have had no effect in the producing capacity as it takes 3 or 4 days for the mash to ferment.

Mr. GATES, Recalled: On 20th June, 1904, gauged some whiskey shipped by defendant company to E. E. Yarbrough which we found in Southern depot at Atlanta and seized. 5 boxes, each containing 4 jugs, lacked a gallon of being full. Next day found another shipment of the same size. Proof was 90. 19 boxes in all. 39 gallons of 90% whiskey in the two shipments. Each jug lacked a gill of being full, is my recollection. Examined similar jugs at Mr. Yarbrough's place of business. Proof was 90%.

E. E. YARBROUGH. Live at Austell, Ga. In the whiskey business in Atlanta in 1904 and 1905. Bought 5 barrels of whiskey from the defendant company on a basis of $1.30 per gallon, 100%. Bought 2 shipments of 20 gallons each in 2 gallon jugs, prices $1.10. Did not proof it. Was to get I (164) think 20 gallons each week.

Cross Examined: The price I paid for this whiskey was the current market price for such goods at the time. Bought it for 80% or 90%.

R. B. KING: Live at Fayetville, N. C., Druggist Bought some whiskey from the defendant company. The total

amount of $160.60. Rate of $2 per gallon. Packed in crates, pints and quarts. Last shipment January 9, 1904, first, September 30, 1903.

Cross Examined: The price I paid was the full market price for this liquor.

THOMAS W. KING: Live in Greensboro. In the whiskey business in 1904 and 1905. Bought whiskey from the defendant company April 27, 1904, $31.50. June 26, $10.59. Case goods, quart bottles. Did not proof it.

CHARLES SCHALL: Live in Florence, Ala. In the saloon business in Sheffield, Ala., in 1904. Bought 80% corn whiskey from the defendant company. Small kegs, about 4 gals. to the keg. Bought it for $1.05 per gallon, but it was billed at $1. 17 kegs; got 2 a week. First shipment 30 March, 1904, last, November 16, 1904. Know Mr. Root, deputy collector. Saw him proof some whiskey in these kegs.

Cross Examined: Mr. Root claimed it was 80% whiskey. That was the market price for that grade of goods at the time. Whiskey was sold me by Mr. McElwee, the defendant company's travelling salesman.

V. S. ROOT: Remember proofing the whiskey referred to by last witness. Found it to be 80%.

(165) Col. W. S. CHAPMAN, examined by Mr. HOLTON:

Q. What is your business? A. Internal Revenue Agent.

Q. Where are you assigned to duty? A. Greensboro is my headquarters.

Q. Is the distillery of D. E. Kennedy in your division—where he operated last year? A. Yes, sir.

Q. Have you visited the place recently? A. This, I understand, is at Williams, N. C., D. C. Foster.

Q. That the distillery described by Mr. Johnson, Mr. Minor and Mr. Peake last week? A. Yes, sir.

Q. When did you go there? A. On the morning of the 1st inst.

Q. What was your business? A. I went there for the purpose of making an examination of his distillery—that is a part of my duty.

Q. What was the other purpose? A. For the purpose of making a test as to the capacity of the distillery. That is really a part of the duty of the examining officer.

Q. Did you make that test? Did you go there for the purpose of making that test? A. Yes, sir.

Q. What did you do when you got there? A. Reached there about 12:30 on the 1st, and in company with Messrs. Jackman, Johnson, Redman, Minor and Peake. I cannot recall their initials.

Q. What did you find when you got there? A. The distillery was in operation and we found the beer from tubs 4 & 7 and 6 & 1 had been empted into the beer well. A portion of this had been distilled. Tubs 4 & 7 were the ones due to be empted on that day, that is the expiration of the fermenting period. The fermenting period of this distillery is 96 hours.

(166) Q. Were they empty or full? A. Empty.

Q. What was the next day's work? A. 6 & 1. It is required to keep each day's product separately, and the records show the emptying and filling of only two tubs each day, but on that day they had empted the four. It was explained to me by the storekeeper, that they had asked him to empty two tubs in advance, and he asked whether he had done wrong, and I told him that the distiller had a right to empty his beer at any time within the fermenting period, but did not have a right to *fu*ll the tubs oftener than once in 96 hours, but that each day's product must be kept separately. The tubs 6 & 7 which had been empted were also distilled, and a portion of it gauged that evening and a portion of it the next morning that amounted to 277 and a fraction gallons. In order to make the test thorough and complete we determined to see that the beer from the next two tubs were distilled—

Q. What was the condition of the beer in the next two tubs? A. It was still fermenting, and from the appearance of it and consulting these expert distillers, they told me it would be ready the next morning for distillation.

The defendants object to any evidence as to the test made in this distillery. Overruled. Exception.

Q. Proceed, Col. A. I asked the manager, or rather he was in charge that day—Mr. Yates, the regular manager, was not there—Mr. Cowan, who seemed to be acting manager turned over the key to me. I informed Mr. Cowan that we would make this test and he gave me the key.

Q. What time of day was that? A. Almost sun-down or dark. The work about the distillery had been completed and he was through with his work.

Q. Gave you the key to what? A. The distillery building. The store-keeper had the keys to the locks inside of the

(167) distillery.

Q. What kind of a house is it? A. Large frame building.

Q. Secure—to prevent any one from entering except through the door? A. Could not enter there without there being some evidence of it.

Q. You left there, did you, when you got the key? A. Went to Mr. Kiger's about a mile from there and got supper. I started to return to the distillery with 2 or 3 of these gentlemen and Mr. Nissen, whom I had 'phoned during the day came to the house, and I directed him to take the key and these men and go to the distillery and watch it during the night, and see that nothing was disturbed. I reached there the next morning about 7 o'clock with Mr. Redman and Mr. Peake. Overtook Mr. Yates just before we got there and we went on together. Fire in the boiler but the steam was not up to start the distillery. The records showed the distillery had started the day previous at 6:30 but we did not get enough steam to start until about 8:30. Mr. Jackman, who is a practical distiller, as well as an engineer, said it was not sufficient to distill the beer properly, and we shut down. Had some difficulty in getting up the steam, but it was finally gotten up and the distillation of this beer was completed finally between 2 and 3 o'clock. The whiskey was run down into the cistern room and into the cisterns and it was all withdrawn that night except a small quantity which was reported the next day afterwards. It was put into barrels and weighed and tested by the gauger himself in the presence of myself and the other officers who were there. During the night Deputy Collectors Greene and McCoy came to the distillery.

Q. You found them there the next morning? A. Yes, sir.

Q. Had you sent for them? A. I 'phoned them, yes, sir, and directed them to go to the distillery,

Q. What was the result of the work that day? A. 555.27 gallons, and there was a small quantity remaining in the leach (168) tub.

Q. What is the leach tub? A. Well, it was a cistern into which the distillery flows before it is passed into the regular cistern, passes through charcoal and it takes a little time to filter through, and we did not wait, and I directed the officers to ascertain the exact amount and report it to me, and they reported 10.06 I think, made 566.33, I think—I have forgotten the exact fraction.

Q. What was that made from? A. From the beer from tubs 3 & 8.

Q. How much material was in there? A. Tub #3, 80 bu. of meal, tub #8, reported to have 21; that is the report of

the store-keeper show these tubs to have been mashed on the 30 and to contain that amount of meal.

Q. Did you notice the beer during the day you reached there? A. Yes, sir.

Q. Was there any change in it from that time until the next morning? A. I could not see that any change had taken place.

Q. How long have you been in the service? A. 27 years.

Q. Have you had any experience in examining stills? A. Yes, sir.

Q. Did you observe the plan of that distillery? A. Yes, sir, Mr. Yates gave me the plan they have at the distillery. I have not seen that one. I have the plans that he gave me in my pocket; there are three copies of those plans made at the same time; go to the collector and the collector forwards them to the commissioner.

Q. Whose name is over the door of this distillery? A. D. C. Foster.

Q. I now hand you the plan of the distillery of D. E. Kennedy, #3—The D. C. Foster survey—Examine that and see whether you examined the distillery in comparison with the distillery called the D. C. Foster plant—and state how that compares with the one of D. E. Kennedy? A. I made this exam-
(169) ination.

Q. See whether that compares with this other one? A. I see representing the beer well—I find that there are two cisterns on that same floor, one designated here under the letter "G" as a low wine tub, and the other "F" as a whiskey tub.

Q. The letter "F" in the plan of the Kennedy distillery—how much does that hold—compare the corresponding sheets? A. They both seem to be the same.

Q. The same? A. The same capacity, "F" 500 gallons capacity. One marked "G" designated as the low wine tub—it is not spelled correctly here—marked 732 gallons.

Q. Did you find both of those tanks there? A. I found a tank there with the capacity marked on it. 718—that one was 718. Measured across the top and found it 69 inches; it was a sloaping tub, and I did not get the bottom diameter; depth 48 inches.

Q. What slope did it have? A. I could not work it out without giving the mean diameter which I have not got.

Q. What is the slope of that tub? A. Between 4 and 5 inches, I should judge.

Q. Did you work it out how much it would hold? A. I find this amount very nearly accurate from making an estimate. They had a stick and I put it 15 gallons for every inch

in depth, and that is very nearly correct. 718 I think is an accurate estimate but I would not say positively.

Q. What was the letter on it? A. No letter that I could see. Tub "F" is 732.

Q. What is the other? A. 500.

Q. What is that marked on the plan? A. "F."

(170) Q. Both of those tubs in there? A. Neither of those tubs were in there; that is, neither of their measurements correspond with the measurements of the tubs we found there.

Q. What was the difference? A. A difference of about 14 gallons. It is possible that that tub might have been substituted and might have been the one we found there.

Q. Substituted for which one? A. "G."

Q. What is the capacity of that on the survey? A. 732.

Q. How much did the other one hold—the whiskey tank? A. You mean the whiskey tank just referred to?

Q. Yes, sir. A. 500 gallons.

Q. In the original survey? A. 500 gallons.

Q. Low wine tank was 732? A. Yes, sir.

Q. And you only found one of those tanks there? A. Yes, sir. I found instead of that low wine tank a pipe leading from the flow box or separator box—at the works of the still—a pipe leading directly down through the floor into the beer well, and that is not represented on the plan. They claimed it was there for running away a part of the product that could not be utilized without re-distillation.

Q. Have you examined the other sheets of that Foster plan so as to compare the other with the original plan of D. E. Kennedy, admitted to be his handwriting? A. It would take some time to make a thorough examination and compare them.

Q. Did you compare the distillery with the plan handed you by Mr. Yates? A. Yes, sir.

(171) Q. How did it compare with it? A. I was simply calling attention to the differences—no such pipe shown on this plan.

Q. Any other difference in the plan and the distillery as found by you? A. We found a pump there used, they said, for pumping water up to Mr. Williams' house. That pump was not exactly on the survey of the distillery, but a part of the distillery premises, although not calculated in the plan of this distillery. Also a screw on this pipe leading down into the beer well, and a————on this pump used for the purpose of pumping water up to the rectifying house and to the premises of N. Glenn Williams.

Q. How far was that line from the place where you say

this connection could be had? A. I suppose about 25 or 30 feet between the ends of this pipe and the pump. No pipe there at the time, and no hose, at the time I made this examination. I called Mr. Yates' attention to it and asked him if these things had ever been submitted to the Department. He said his attention had never been called to it before, that it was put there by those who constructed the distillery. I asked Mr. Minor if he put it there, and he said he had not—put there after he left there.

Objection.

Q. How about the mash tubs and the arrangement of the distilling apparatus? A. At a cursory examination it appears to be the duplicate of the other plan.

Q. Did you examine those premises sufficiently to state whether or not the plan you had in your pocket corresponded with the distillery as now constructed? A. As far as I could tell without making an actual measurement of the vessels—the tubs and things were there.

(172) Q. Measure any of the fermenting tubs? A. No, sir, but they corresponded sufficiently with this plan—and, indeed, there was no question about their being the same tubs or beer well, or mash tub—the man who constructed the distillery was there himself—

Q. This the distillery described by Mr. Johnson when he was on the stand at which he worked for Mr. Kennedy? A. Yes, sir.

Q. And by Mr. Minor as the one he built? A. Yes, sir, the same that Mr. Minor said he built.

Q. What is the number of the distillery? A. #3.

Q. That the survey signed by Mr. Kennedy? A. Yes, sir, the draughtsman's survey.

CROSS EXAMINED BY MR. CANSLER.

Q. Let me see those plans—when was it you went to this distillery? A. On the 1st of November.

Q. For what purpose did you go? A. To make an examination of the distillery.

Q. What do you call an examination? A. Also for the purpose of testing the capacity of the distillery.

Q. For both purposes then? A. Yes, sir.

Q. Can you refer me to your authority for testing the capacity of this distillery? A. I could furnish you some letters directing me to visit these distilleries and make a careful examination of them to prevent illicit whiskey being produced.

Q. And authority in the Revised Statutes as to making a test? A. That would come under section of making an examination. I could show you more specific directions or instructions from the Commissioner of Internal Revenue. (Section 3252 read in evidence by Col. Chapman; sections 3177, 3277, 3286, 3318, 3167—,68,—69,—70 cited.)

Q. What I particularly want to direct your attention to is the authority in the R. S. to make a test of the producing (173) capacity of that distillery? A. I don't know that the law designates an examination as a test?

Q. You know of no statute that specifically designates or provides that when an examination of a distillery is made you may take charge of it and test its capacity? A. I think the Commissioner of Internal Revenue would have the power to direct—I don't know of any section that directs the agent here.

Q. Is it your habit, Mr. Chapman, to take possession of a distillery over the protest of the owner, or in his absence, for the purpose of testing its capacity? A. No, sir, it is not. There was no protest made in this case.

Q. No one there to protest was there? A. I suppose Mr. Yates could have done it. He had 'phoned me that he represented—

Q. He was not there the day you took possession of it? A. I cannot say that we took possession of it—We simply noted the operations of the distillery, nor did we take entire charge when making the experiment.

Q. You went there on the first? A. Yes, sir.

Q. Mr. Yates was not there then? A. No, sir.

Q. You put guards in charge of that distillery? A. Yes, sir, to see that nothing was disturbed.

Q. Preparatory to making the test the next day? A. Yes, sir.

Q. Under the law the store-keeper and gauger have the keys to the Government locks in the distillery and warehouse? A. Yes, sir.

Q. Were those keys turned over to you or your agent? A. The store-keeper had possession of his keys and the gauger of those belonging to the cistern room.

Q. I ask you if the officers and agents you had there were not in physical control of that distillery during the night of the (174) 1st of November? A. Had such control as to prevent its being interfered with without their knowledge.

Q. The only people who were there? A. The manager went to the distillery himself and reached there a few minutes after these men got there.

Q. Not there during the night? A. I was not there in the night.

Q. You were not there yourself? A. No, sir.

Q. You put these officers and agents in charge of that distillery, and they were sufficiently armed with deadly weapons to keep control? A. I did not know that there was a pistol in the crowd—I did not have one myself.

Q. As a matter of fact there were not only pistols but a double barrel shot gun? A. I did not see it.

Q. Didn't one of the officers have a double barrel shotgun—Mr. Nissen? A. I did not see it; that is the first I have heard of it.

Q. You say you did not see a pistol? A. No, sir.

Q. You got there about 12 o'clock on the 1st of November? A. 12:30.

Q. In the daytime? A. Yes, sir.

Q. In what condition did you find the distillery proper? A. It was running and apparently running in good order.

Q. From which of these fermenters or tubs was the beer being distilled?

(Plans of the distillery handed witness.)

Q. Designated by letters? A. No, sir, the pages are not lettered.

Q. The plans— A. No numbers on those large fermenting tubs at all; had some difficulty and had to call up the dis-
(175) tiller to designate them—It is a violation of the law in the State Court—Found tubs one and seven empty.

Q. Any others empty? A. Six and eight were empty.

Q. Know when they had been empted? I ask you when those tubs you have designated as being empty—when were they emptied? A. We found them empty and I can only state what the operatives about the distillery told us; they said they had been empted that day.

Q. All 4 tubs? A. Yes, sir. I started to tell you that the store-keeper and gauger told me that he had permitted the emptying of two tubs before the expiration of the fermenting period, which made the emptying of four tubs that day. When I went back with him again it seemed that the operatives at the distillery said they had not empted but one set of tubs that day.

Q. Which were they? A. One and six.

Q. Was that Mr. Cowan or another young man? A. Both of them said that; there was some question about it, which lead to this trouble; after they got together the whole of them agreed that all four had been empted that day.

Q. Who got together? A. The store-keeper and gauger, and Mr. Cowan and Mr. Strutz, and that the produce we found there was the result of those four tubs.

Q. Where did you find that product? A. Part of it in the cistern room and part in the leach tubs and in this tank.

Q. What is it numbered? A. Marked 500 gallons—or the whiskey tub "P"—that is the one we found had been removed and another put in its place, much larger capacity than that—marked 718 gallons.

Q. Did you measure the quantity of whiskey that was in this tub—whiskey tub, and in the cistern? A. I did not meas-
(176) ure that that was in the cistern. We could not measure it because the gauger had drawn out of it a barrel about half full—109%.

Q. Do you know how many gallons was produced that day from these tubs? A. Yes, sir, from tubs four and seven they produced 275.28; and tubs 6 and 1 when the distillation was completed and withdrawn the gauger's report showed 277 gallons and a fraction.

Q. Those two runs were made as you understood it that day? A. Yes, sir, this is what they reported.

Q. And represented in fact the work of two days? A. Yes, sir.

Q. And was perfectly permissible under your regulations? A. Yes, sir.

Q. I believe you stated on your direct examination that Mr. Cowan gave you the key when you went there? A. When we left that night.

Q. The first day you were there, as I understand you, you did not have complete supervision and control of the distillery? A. No, sir, I just noted the operations of the men in charge of the distillery.

Q. Who were the parties that went with you? A. Mr. Jackman, Mr. Minor, Mr. Redman and Mr. Peake.

Q. Under what authority did they go out there? A. The District Attorney, I think, had obtained authority from the Department of Justice—from the Attorney General.

Q. They were not your deputies? A. No, sir, simply assistants.

Q. As far as you know personally they had no authority at all? A. They would not have had unless they had been properly commissioned by the collector.

Q. Why did you go? A. I wanted to make an examination of this distillery any way—a great deal said about it—
(177) Q. At whose request did you go? A. After a conference with the District Attorney I told him I would go.

Q. You knew Mr. Yates was the legally constituted officer of Mr. Foster? A. I did not know it until I got there.

Q. You did ascertain that the power of attorney from Foster to Yates had been filed with the proper authorities? A. I did not know it. I inquired for Foster but he could not be found.

Q. Did you ascertain that fact before you went to examine the distillery? A. No, sir, I did not until after I reached there.

Q. After you reached there? A. I knew it from the men themselves, who said that Mr. Yates was attending court, and when I would ask them about the distillery or want information they said the manager was not there.

Q. Told you he was the manager? A. Yes, sir, said that he was attending court.

Q. What is this called? A. The plan of the distillery.

Q. Made by whom? A. The draughtsman—I think this is made by Joe D. Terry—This one is here.

Q. These plans approved by the proper Internal Revenue authorities when Mr. Foster was granted permission to run this distillery? A. I presume that they passed through the regular course of such papers.

Q. And I understood you to say that the plans of Mr. Foster are substantially identical with the plans filed by Mr. Kennedy? A. From a cursory examination—I have not had time to determine that minutely.

Q. What time did you leave the distillery that first day (178) you got there? A. I did not look at my watch, but it was not quite dark—between sun-down and dark.

Q. What time did you get back the next morning? A. About 7 o'clock.

Q. Who did you put in charge of that distillery in the interim? A. Deputy Collector Nissen—in charge of the men with him.

Q. He was the only party that you put in charge of the distillery? He was the only Government officer that had charge? A. Yes, sir.

Q. Know who was with him that night? A. I did not see those officers there until the next morning. I found Greene and McCoy there early the next morning and they said they got there between 12 and 1 o'clock.

Q. When did Mr. Nissen come? A. Just after supper.

Q. How did he happen to come? A. I had some conversation with him, but I directed Mr. Minor to go to the nearest office, and I think he went to Louisville, and 'phoned for two of the officers from here, and also for a division deputy if one could be found at Winston.

Q. You authorized him to do that? A. Yes, sir, and Mr. Nissen replied that he could not find a division deputy.

Q. Didn't Mr. Minor make himself very active in this investigation or test? A. I cannot say any more active than the rest of the men were. They were asked and instructed to watch the distillery. Expert distillers and knew how to operate a distillery.

Q. He was not? A. He was a distillery builder. I wanted for my own benefit to get the information—

Q. Mr. Minor was actively in charge there during the night as one of the guards at that distillery? A. I cannot say how active he was—perhaps Mr. Nissen—

(179) Q. I understand you to say you began to make this run on the morning of the second? A. Yes, sir.

Q. What time? A. Between 8 and 9 o'clock before the temperature got up sufficiently to start. Steam was only turned on a short time, 15 or 20 minutes, and found it impossible to run the distillery. Unless the steam is up and carries sufficient pressure there is a loss in running the material through the distillery.

Q. How many pounds did they have on hand when you first stopped? A. Between 30 and 40.

Q. You say that Mr. Jackman stopped the distillery because he lacked sufficient steam? A. Yes, sir, said there was not sufficient steam to get out all the beer that went through.

Q. Not operating with sufficient velocity to get all the whiskey out of the beer? A. Yes, sir, forced through there and comes out of small holes.

Q. Do you know at what pressure that distillery would have to be running to extract all the spirits out of the beer? A. No, sir, we finally got a second fireman, who seemed to be better than the first one, and got it up to between 80 and 90.

Q. You don't know what pressure is necessary to extract all the whiskey out of the beer? A. No, sir.

Q. You do not know that unless there is sufficient pressure part of the spirits go through and is lost? A. I had made a test before and had that same thing to deal with.

Q. What examination did you make of these tubs in which the beer was the night before? A. They were in plain view—could see them from the floor. I did not make an examination of the beer except to look at it.

(180) Q. Did you notice it? No, sir.

Q. Was the requisite quantity of beer in each of these tubs? A. They seemed to have about the usual number of dry inches.

Q. The number of inches that is dry— A. Between the top of the beer and the top of the tub.

Q. Notice anything the night before wrong about this beer? A. No, sir, fermenting nicely.

Q. And the tubs were in ordinary and usual condition? A. Yes, sir.

Q. Make any examination of it the next morning? A. I went to the tubs when we first got to the distillery and they seemed to be in the same condition, and the fermentation and completed in the tubs to be distilled that day.

Q. How many hours had the beer in these two particular tubs, that were used in making the test on this day, been fermenting? A. Mashed on the 30 and distilled on the second.

Q. Let me know for convenience how many hours that would be? A. The distiller's record shows put in mash at 12 o'clock a. m. on the 30th.

Q. How many hours would that be after fermentation began before you began to make the run? 72 hours? A. Yes, sir, not quite 72 hours. The distillation was begun between 8 and 9 o'clock; if it had remained in there until 12 it would have been exactly 72 hours.

Q. The beer in these two tubs was in a site of fermentation 68 hours before the distillation began? A. Yes, sir.

Q. That the usual time? A. 96 hours.

Q. I ask you if the results and largest yields are not obtained when the beer is in a state of fermentation 96 hours? A. No, sir, if they use an active fermenting agency and the fermentation is completed much earlier and it remained in there 96 hours, it would lose.

(181) Q. That would depend on whether it had been in a state of fermentation already and on the character of the yeast? A. Yes, sir, have something to do with it.

Q. And the character of the yeast? A. On the activity of the fermenting agency?

Q. What other fermenting agency is there besides yeast? A. If the distiller used 100 pounds of malt in making his yeasts and the balance of his malt was put in to the mash tub after the corn meal had been mashed, and that went through the process of mashing at a lower temperature than the corn—

Q. Those are the only fermenting agencies used—the malt that was used in the yeast, and the malt that went through the same process as the corn? A. The distillers sometimes take the balm off the top of the one tub and put it in others. During the process of the fermentation the foam that accumulates on top of the tub is what the yeast is made from; some use that and carry it back to the next tubs.

Q. In order to increase the fermentation, distillers sometimes take the top or scum of one tub and put it in another? A. Yes, sir, and it helps the fermentation.

Q. Is it not a fact that the quantity of yield—in gallons, of spirits—from a bushel of meal depends very largely on the way in which the fermenting agencies do their work in the beer tubs? A. Yes, sir, if the machinery is properly run for the purpose of evaporating the alcohol it depends almost entirely on the fermentation.

Q. And the fermentation depends entirely upon the fermenting agencies you have described? A. On the proper management of them, and there is a certain temperature that the distiller must get his mash up to before it breaks up the starch cells.

Q. And in order to have the fermenting agencies do the most effective work he must have a knowledge of his business? A. Yes, sir.

Q. And how to produce this fermentation and what heat his mash must be subjected to? A. Yes, sir.

(182) Q. And to reduce the question to the last stage of anlysis—the quantity of the yield from a given quantity of meal depends very largely upon the skill and watchfulness of the distiller? A. Yes, sir, very largely.

Z. H. Cotner, Live at Clemmons, N. C.; am and was Southern R. R. Agent at that point in 1904 and 5; town of Williams is located about 9 miles from Clemmons; Clemmons is the shipping point from Williams; I know D. E. Kennedy; received freight at Clemmons for him, consisting of household goods, etc.; also received freight addressed to the defendant company; different articles; received whiskey addressed to that company; barrel goods generally; don't know the amount or number of barrels; I received some small packages; those originally shipped from that point but returned; don't remember to have ever received any case goods for the company; (183) the whiskey I did receive for that company was delivered to the drivers of the Old Nick Williams Co.

This witness then read from copies of way-bills of the Southern Ry. Co., showing that from Jan. 1, 1904, to April 22, 1905, shipments of packages supposed to contain spirituous liquors had been made from Clemmons in the name of the Old Nick Williams Co. to the number of about four thousand, weighing a total of 822,073 pounds, nearly all of these shipments consisting of one or more cases, kegs or other packages supposed to contain less than 5 gallons of spirits, and consigned to different parties in the States of North Carolina, Georgia, Alabama, Florida, Virginia and West Virginia, some of these parties being witnesses who testified in this cause to having received shipments of spirits from the defendant company.

This witness further testified that these shipments were delivered to him by colored men driving the teams of the Old Nick Williams Co., and that he issued triplicate bills of lading for each shipment in the name of the defendant company, and delivered same to the drivers delivering him the packages. That the railroad company had given the defendant company a special rate on shipments of spirits, and that most of the packages above referred to were shipped in accordance with that rate.

This witness further testified that between the 1st of January, 1904, and the 22nd of April, 1905, he was acting as Express Agent at Clemmons for the Southern Express Co., and received during said time some two thousand packages, boxes, kegs or cases supposed to contain spirituous liquors, weighing (184) a total of 113,671 pounds, from the drivers of the Old Nick Williams Co., which were expressed in the name of that company to divers parties in and out of the State of North Carolina; nearly all of said packages weighing from 25 pounds to a hundred pounds each.

Witness testified to the foregoing facts by refreshing his memory from the examination of records or copies of records made by him contemporaneously with the transaction there recorded, and not from any independent recollection he had of said transaction. That the Southern Express Co. had also given the defendant company reduced rates on the shipment of whiskies; that the foregoing shipments were made in accordance with said reduced rate, the express in most instances having been prepaid by said company.

George Braswell. Live in Pine Level; bought 10 cases of Jolly Boy from the defendant company in 1904; 3 gallons to the case; put up in bottles; paid for same by check; at the rate of $4.90 a case; thought this was the full price.

Mr. Cotner (Recalled). Most of the boxes containing the case goods referred to by me when last upon the stand, were made out of light pine lumber similar to boxes now shown me; weighed a lot of cases when the defendant company first commenced shipping; I billed case similar to that shown weighed as 65 pounds; have shipped cases containing kegs for defendant company; they weighed 60 pounds; contained 4½ or 5 gallon kegs; ordinary keg weighs 45 pounds.

(185) J. H. Hutchenson. Live in Seville, Ga.; bought some whiskey from defendant company in 1904-5; Nov. 26, 1904, 10 cases, quarts, 6 year old Old Nick Brand, $6.00 per case; 10 cases Jolly Boy, $4.40 per case; one case half-pints,

Jolly Boy, free; 48 half-pints in case; think also purchased 48 1-gallon jugs, eighty proof corn, 6 jugs to the case; $1.15 per gallon; I paid freight; suppose eighty proof liquor; never gauged it; Jan. 11, 1905, 5 cases, quarts, $4.40 per case; Jan. 14, 10 gallons ninety proof apple brandy, $1.50 per gallon; 10 gallons ninety proof peach brandy, $2 per gallon; shipped in 5 cases, 1-gallon jugs; 6 jugs to the case; Feb. 28th, 1905, 24 1-gallon jugs, eighty corn, $27.60; freight paid on this shipment by the company; March 8, 1905, 10 gallons peach brandy, $2.00 per gallon; I paid freight; Feb. 11, 1905, 30 1-gallon jugs, eighty proof corn, $34.50; they paid freight; 5 cases, quarts, $4.90 per case; I paid freight; July 15, 1904, 10 cases, 6-year old corn, $6.00; 1 case Favorite, gratis; Jan. 16, 1904, 6 cases 6-year old corn, quarts, $24.00; 1 case 6-year old corn, half-pints, $7.00; no date, 4 7/8 gallons hundred proof apple brandy, $8.55; 12 quarts, 6-year old corn, $6.00.

Cross Examined. So far as I know I paid full market price for these goods; some of these shipments came in jugs marked 5-gallon jugs; can't say whether they were full measure or not.

W. A. Stewart. Live in Forsyth County; a mile and a half from Williams; worked for the defendant company; made whiskey tub for still house; at request of Mr. Williams; said (186) other one leaked; one I made held 700 gallons; put it on lower floor in still-house; ran whiskey into it; it was hauled from my house to still-house by Mr. Williams' team and hands, I suppose; this last spring a year ago; Mr. Williams gave me company's check for work; other tub had been leaking all the time; saw where it leaked; floor was wet.

Cross Examine. Mr. Williams told me that the old tub was leaking; wanted better one; I saw it had been leaking; I made the new tub out of staves which had been intended to be used for a low wine tub in distillery, but which had not been put up; the tub I put in was larger than the one I took out; couldn't say how much.

H. S. Harkins. Collector of Internal Revenue, Fifth District, North Carolina; town of Williams in that District; I hold in my hand plan of distillery of D. E. Kennedy; plan signed by Mr. Kennedy and my deputy in charge; dated Feb. 5, 1904; received no notice of any change in these plans; capacity of distillery was reduced from 101 to 21 bushels on April 20, 1904.

MARK W. BROWN. Live in Asheville; agent for National Surety Co.; executed D. E. Kennedy's distillery bond on April 22, 1904; bond handed me by District Attorney is identified by me as the one executed, above referred to; premium was paid by check signed by defendant company, per N. Glenn Williams, to the best of my recollection; renewal premium for this year was also paid in same way; these checks were drawn by the defendant company in favor of Kennedy, and Kennedy endorsed them to me.

(187) W. T. PACE. Live in Franklin, Va.; Manager Franklin Dispensary; bought liquors from defendant as follows: Feb. 14, 1905, 3 cases, $18.75; March 7, 1905, 5 cases, half-pints, $6.50; 2 cases pints, $6.25; March 24th, 10 cases, half-pints, 6-year old, $65.00; 3 cases, pints, $18.75; 2 cases, quarts, $12.00; April 11, 1905, 25 cases, half pints, 6-year old Corn, $6.50 per case; paid for all these shipments by check.

J. F. YARBROUGH. Live West Point, Ga.; purchased corn whiskey from defendant company in spring, 1904; 4½ gallon packages; 30 kegs; claimed to be ninety proof; $1.10 per gallon, I paid freight.

Cross Examine. Purchased from Mr. McElwee; sent part of kegs back; promised to send others; had bought similar whiskey at other places at the same price.

FRANK EDDLEMAN. Live in Yadkin; ran distillery in Williams four or six months ago; quit last July; succeeded A. Dinkens; he had five or six thousand gallons in his warehouse when I bought him out.

J. A. PETRIE. Am Division Deputy Collector, and designated to assist in surveying distilleries; surveyed distillery of D. E. Kennedy #3 on Feb. 2, 1904; identify these as plans that I had before me in making survey; fine one whiskey tub to be marked 500 gallons on these plans indicated by letter F; I measured this tub and its capacity was as represented on plans; this is the tub that receives the whiskey as it comes from (188) condenser; it runs from this tub by way of pipe to the cistern room; some distance away from distillery; whiskey passed into tub from distillery by pipe.

Cross Examine. I made this survey to show producing capacity of this distillery; this diagram also shows a low wine tub, 732 gallons capacity; spirits could as well have been run

into low wine as a whiskey tub; both tubs were set up when I made the survey; measured all the vessels and the tubs shown on this plan and verified their capacity, as stated on plan; these plans and specifications were correct according to my measurement; after having made that measurement, I reported the capacity of the distillery to be 101 bushel house; and registered its producing capacity at 80% of 353 gallons of hundred proof spirits per day; this result of my investigation and measurement; a sour mash distillery like this one, the producing capacity is based upon 3½ gallons for every bushel of grain mashed in, and the number of bushels mashed in depend solely upon the size of the fermenting tub.

Re-Direct. Sweet mash distillery is supposed to have a greater producing capacity than a sour mash one; based upon an average of 4½ to 5 gallons for every bushel mashed in; can't tell you how you operate a sweet mash distillery; I surveyed this for both a sour and sweet mash distillery, and so reported; the law always requires the distillery to pay taxes upon 80% of the surveyed capacity of distillery.

Harry Nisson (Recalled). Was at distillery of D. C. Foster #3 the night of the 1st inst.; went there at request of (189) Col. Chapman; got there in the night-time; remained till three or four o'clock of afternoon of 2nd inst.; stayed in distillery the greater part of the night; in 50 feet of the fermenting tub; no one came in distillery except Mr. McCoy and Mr. Green at 12:30 at night; Mr. Yates came in few minutes afterwards; to my knowledge there was no interference with the beer in the fermenting tubs that night.

Cross Examine. Col. Chapman put me in possession of this distillery; when I got to the distillery Mr. Jackman and Mr. Johnson were there; Mr. Minor, Mr. Jackman and myself were in distillery when McCoy and Green came; remained in control of distillery until next morning, when Col. Chapman came.

W. L. Crews. Live at Advance, Davie County; am rectifier of distilled spirits; for seven or eight years; think I know how to rectify spirituous liquors; rectify to make the liquor better; you can age liquor by rectifying it, or give it the appearance of being aged; bring it up to the same standard of aged liquor; you can take six months old liquor and rectify it and make it taste and appear to be older than it really is; it reduces the proof to some extent; you put rock candy syrup

in it; if you wish to make 5-year old whiskey out of a hundred proof new whiskey by the process of rectifying, it will reduce the proof some, you put rock candy syrup in it; we reduce ours to ninety per cent. without adding water.

E. VOGLER. Am rectifier; been in the business 6 or 7 years; think I understand process of rectifying; it helps whiskey a heap to rectify it; you can take new corn whiskey and (190) rectify it so that it will pass for 5-year old corn; reduces the proof a little; don't know how much; expect two or three degrees; you use rock candy syrup; we reduce it to 90% in our establishment.

Cross Examine. You might reduce the proof by one means and another rectifier by another; each rectifier has his own way of rectifying and aging spirits.

O. O. HOWARD. Live in Iredell County; known D. E. Kennedy for 4½ years; acquainted with him when he lived in Iredell County; he did not own any property that I ever heard of then.

Cross Examine. This was 4½ years ago; quite a young man when he left our neighborhood; just begun to work for himself.

GEO. L. LYONS. Had transaction with defendant company in April and May, 1904; got one case whiskey, 12 bottles, quarts; paid $8.40 for the case containing 3 gallons.

E. E. YARBROUGH (Recalled). By agreement examined by defendant's counsel. Gates seized whiskey sent to me by defendant company; he told me at the time he made seizure that he did so because there had been no taxes paid on it; he says, "You know the tax has not been paid on it or they could not sell whiskey at the price they do and pay the tax on it;" the whiskey seized by him was in retail packages; less than 5 gallons; I think he told me that he was not going to allow defendant to ship whiskey into his territory in jugs and kegs because (191) there was not any tax paid on it; I received similar shipments of goods from Louisville, Ky., and Cincinnati; he never seized them.

C. C. BUTLER. Live in Jacksonville, Fla.; bought a hundred cases of whiskey from the defendant company Feb. 19, 1905; through Mr. Woodward; paid $3.20 per case for 50

cases; #7; and $3.80 for 50 cases straw colored #9; put up in quarts; with labels and caps.

Cross Examine. This was current market price for these goods; figured the whole thing out with Mr. Woodward; we took the Peoria, Ill., basis of spirits; also took into consideration the cost of packing, bottling, etc.

E. G. WEST. Live in Greensboro; on Nov. 26, 1904, bought from defendant company one box of quarts apple brandy; $6.70; 3 cases of quarts of corn whiskey; $14.70 for the 3; 1 case of pints, $5.15; 1 case of half-pints, $5.40.

Cross Examine. That was the full market price for these goods at the time.

W. M. WHEELER. Live in Greenville, S. C.; ordered whiskey from the defendant company in July, 1903; probably half dozen times; case of 12 quart bottles each time; all orders come by express.

J. D. HUNT. Live in Greenville, S. C.; bought whiskey from the defendant company December last; 1 case containing 12 quart bottles; similar to bottles shown me; by express; prepaid.

A. D. PORCHER. Traveling salesman; live at Columbia; formerly agent for the Southern Express Co., at Winston; from Oct. 18, 1900, to Sept. 30, 1904; shipped goods for the defendant company during that period.

(192) The Government introduced J. D. PROCTOR, D. E. JACKSON and W. M. POINDEXTER, former agents of the Southern Express Co. at Winston-Salem, who testified that, between the first day of June, 1903, and the 22nd day of April, 1905, they received from the defendant company some 1,400 express packages supposed to contain spirituous liquors, for shipment to divers parties in and out of the State of North Carolina. These packages weighed from 20 to 100 pounds, average weight of each not being over 50 pounds, and were shipped at a reduced rate of 20%, pursuant to a written contract made between the express company and the defendant company, in many instances the express charges being prepaid by the latter upon delivery of the packages.

ALONZO PATTERSON. Live in Yadkin. Have driven for the defendant company off and on since July, 1903. Hauled

wood to the distillery, boxes from the rectifying house to Clemens and delivered them to the depot agent. Also grain from Clemens back to Williams, and delivered same in the mill at the distillery. Have also seen John Hardin, Frank Lyons, Wesley Lyons, Bol Glenn and Frank Freeze and others doing the same class of work. I made trips with these loads of boxes while there once or twice a week. Hauled with Mr. Williams' teams.

Bob Glenn. Lived at Williams for about 5 or 6 months. Have hauled wood for Mr. Williams to the distillery. He sent me to Clemens a few times; about once or twice a week some times. Hauled boxes from the rectifying house and delivered them to the depot agent at Clemens. Brought back loads of corn from Clemens and delivered same at distillery.

Junius Douthit. Live in Louisville, Yadkin County. Know John Hardin. He drove some for Mr. Williams; also (193) Lon Patterson, Frank, Wesley and Albert Lyons, and Will Cooper. Have seen them hauling loads of boxes to Clemens and returned with loads of grain.

W. M. White. Know D. E. Kennedy, when he lived in Iredell county. Never knew of him owning any property. When quite a young man he left his home in the country and went to Statesville.

R. J. Jones. Live in Danville, Va. Ordered whiskey from the defendant company by express in December, 1904. From August, 1903, to June, 1905, would say I ordered as much as 6 gallons a year. Used it for family use and for my neighbors.

H. W. Thompson. Live in Spartanburg. Purchased boxes of peach brandy from the defendant company weighing 50 pounds. Put up in quart bottles. Also about the same size box in April of this year. Both came by express.

R. D. Banks. Live in Louisville, Ky. Book-keeper for ———— Company. Sold the Old Nick Williams Co., supplies as follows: July 3, 1903, 9,800 labels, $4 per thousand; Sept. 15, 1903, duplicated the order. Also 50 Gross 8¼ hand cut corks; 125 Gross 5XX tapers; 125 Gross 7XX tapers. Sept. 1st, 5,000 fancy top caps, $3 per thousand; 10 gallons of paste; 1 5 gallon copper measure; set of hydrometers; Sept. 1, 1903, 10,050 caps, (10,000 caps different kinds); Sept. 15, 50 Gross #106 fours flint brandy, 50 5/12 Gross Maverick Flint. All delivered f. o. b. cars in Indiana.

W. C. Burnett. Live at Gaffney, S. C. Bought whiskey from the defendant company twice, once in last December, once before that. A gallon each time.

(194) Mr. Cotner. Recalled. Shipped for defendant company April 20th, to R. L. Paylor, Roxboro, one box containing 75 pounds. Q. By District Attorney: How was the goods shipped, what kind of goods? Objection by defendant. Overruled. Exception. A. Way bill shows canned goods, also bill of lading. Witness then, over defendants objection, testified to numerous shipments of boxes by the defendant company to divers parties to different points in North Carolina, which were marked "Canned Goods" on way bills and bills of lading. Also to some shipments marked "Drugs."

Upon cross examination, witness stated that he did not weigh all the boxes or casks which he has heretofore testified were shipped by him for the defendant company. Possibly weighed 2 or 3 when the company commended business, then looked at the size of the box and estimated the weight of other similar packages. Occasionally weighed a box or two if it was a different shape. Same was true with reference to shipments made by express.

R. D. Banks, Recalled. On yesterday in giving shipments made by my house to the defendant company I neglected to state one dated 15th September, 120 Gross 8 oz. Olympia Flasks. The total amount of the entire bill was $657.90.

W. S. Schaffer. Recalled. I bought whiskey from the defendant company in jugs holding 4½ gallons. Never measured them. I think they were 5 gallon jugs. Might have gotten 10 or 12. Not stamped.

Cross Examined: Never measured the whiskey as we drew it out of these 5 gallon jugs. They might have been 4 7/8 gallon jugs or 4 99/100 gallons. I testified to these shipments when on the stand the other day.

(195) W. H. Hoover. Live in Charlotte. Got a few kegs of whiskey. Don't know how many.

Mark Teeter. Live in Salisbury. In business there with W. H. Hoover in 1904 and 1905. 1904 I was in Charlotte in the saloon business. Manager for Ross. 1905 in Salisbury for Hoover. Got possibly 24, 25 or 26 kegs of whiskey from the defendant company; 4½ gallons in keg. Shipped from Clemens to Salisbury. Good whiskey.

J. N. Hunter. Lived in Charlotte in 1904. Bought some whiskey from defendant in jugs and kegs. 12 or 15 jugs and kegs in 1904. Settled for 4½ gallons per package.

R. M. Helm. Lived in Winston in 1903 and 1904. Was loading clerk for the N. & W. Railroad Company. Loaded boxes for the defendant company delivered to me by its employees, who receipted for all these boxes. Receipts signed mostly by A. Lyons. Between August 18, 1903, and July 29, 1904, I received and shipped over the N. & W. Railway for the defendant company 400 of these boxes, supposed to contain whiskey, weighing on an average 70 pounds each. Also one barrel weighing 439 pounds.

Mr. Farriss, Recalled. I stated when first upon the stand that I worked for the defendant corporation during 1904 and 1905. Quit August, 1905. Know D. C. Foster. He was travelling salesman for the defendant company when I was there. Travelled in the South. Have heard shipments read out by witness Cotner. Cannot recall that I made any special shipment. Don't remember any parties' names. Could recall some of the names when witness Cotner was reading them out. Foster was in the employ of the company on the road before I was, selling corn whiskey. Sold small packages. Filled orders sent in by him. In South Carolina principally. Various (196) sized orders. As little as a gallon. He was not engaged in this business all the time I was with the company. Don't remember exactly how much time he was off the road. Suppose probably a third of his time. Mr. McElwee was also travelling for the company. His territory south of Atlanta. Also Mr. Woodward and Mr. W. B. Sellers. The latter travelled in North Carolina and Virginia principally. Don't know of any other firm in the town of Williams that sold retail packages.

Cross Examined: Mean to say that I don't know whether the other dealers in the town of Williams shipped retail packages or not. Had no knowledge on that point. The Sellers referred to by me on direct examination was on the stand the other day.

Samuel Tata. Ran a saw mill 2½ miles from Williams during the years 1903, 1904 and 1905. Furnished Mr. Williams some box lumber framing similar to that used in the boxes now shown me. The box lumber was ⅛ inch thick. Paid me 90¢ per hundred for it. Sold him probably 40 or 50 thousand feet within the two years.

F. J. Sizemore. Live in Winston-Salem. Now travelling. Was shipping clerk for the Southern Railway Company in 1902, 1903 and 1904. Shipped goods for the defendant company. Have the bills of lading. Received from the defendant company 146 boxes supposed to contain spirituous liquors for shipment to divers parties for which I issued triplicate bills of lading in the name of the defendant company and subsequently shipped packages in accordance with said bills. These shipments received between August 18, 1903, and October 26, 1903. The average weight of the packages was 60 pounds.

(197) Charley Carter. Live in Winston-Salem. Was employed by the Southern as shipping clerk in 1903. Received 5 packages from the defendant company on October 22, 1903, supposed to contain spirituous liquors, for which I issued triplicate bills of lading to it and shipped same in accordance with said bills. The average weight of packages was 60 pounds.

Gates, Recalled: Cross Examined by defendant's counsel by permission: Know E. E. Yarbrough, witness on the stand yesterday. Known him since June last. Saw him at Charlotte U. S. Court. Had conversation with him there. He said something to me about me seizing whiskey shipped to him in Georgia. About all I remember is that he said he paid for the whiskey. I asked him how much and he said $20 a shipment, $1 per gallon. Don't remember positively about having said anything to him about seizing all the whiskey shipped from North Carolina. If had such conversation it was restricted to the whiskey shipped to him which I had seized.

W. S. Payton. Live in Winston-Salem. Employed by Southern Railway Company in 1903 and 1904. Shipping clerk. Received from defendant company between June 29, 1904, and October 18, 1904, 50 packages supposed to contain corn liquor average weight 60 pounds, for which I issued triplicate bills of lading in the name of the said company and shipped packages according to said bills. Also received on June 29, 1904, one barrel of corn whiskey, shipped Order Notify T. J. Leggett & Co., Nashville, Tenn., 475 lbs.; Sept. 7, 1904, 5 barrels corn whiskey 2,220 lbs., shipped to R. E. Garner, Anniston, Ala.; October 1, 1904, 2 barrels corn whiskey 800 lbs. shipped to Jerome Dispensary, Jerome, N. C.

(198) R. H. Pender. Shipping clerk for the Southern Railway Company in 1903 at Winston. Received from the

defendant company between October 27, 1903, and June 10, 1904, 119 packages supposed to contain spirituous liquors, average weight about 50 lbs., for which I issued to the said company triplicate bills of lading and shipped goods accordingly. Also received from said company on June 8, 1904, 5 barrels whiskey, 2,270 lbs., shipped to R. E. Garner, Anniston, Ala., 5 barrels 2,275 lbs., shipped to ————————?

PRESTIN BUFORM. Connected with the Southern Railway Company at Winston, N. C., 1903 and 1904, and 1905, part of the time. Made some shipments of goods for the defendant company at Winston. Goods brought there by different parties. Frank Miller, John Hardin, and Bob Glenn. Shipped on October 27, 1903, 2 packages whiskey, Greenville, S. C.

ACE DINKINS. Live in Yadkin County, 7 or 8 miles from Williams. Have been engaged in manufacturing whiskey in Williams. Not retail dealer. Government distillery. Wholesale distiller in 1904. Did not run distillery after 25th November, 1904. Wholesale license expired June 30th. Have on hand in bond 110 or 120 barrels, product of my distillery. Sold some to the Casper Company, and others at Winston. Never boxed and sold any in retail packages. Know of no other party in the town of Williams carrying on the business of shipping in boxes. Know Mr. Schurmer, running distillery. Not retail dealer. No other one in retail business in Williams while I was there except the Old Nick Williams Company. Small town. The defendant company's rectifier was ¾ of a mile from my distillery. I sold it to Eddleman. He is now in the same place. Schurmer operated about ¼
(199) mile north of me. I own the land upon which my distillery was operated. Bought from Mr. Williams. Sold him a barrel about a month and a half ago. Have no recollection of having sold him any other between 1903 and 1905. Cannot tell how much I sold him for my brother. What was sold was delivered at the rectifying house of the company. The company started up the business regularly the first of July, 1903. Cannot tell how many barrels I sold him. Might have been 20 and it might have exceeded 20. Don't remember that I ever delivered him any un-tax-paid liquor or was instrumental in having any delivered.

(200) R. B. SAMS. Revenue agent; in July, 1903; still in the service; visited the rectifying establishment of the defendant company on June 27, 1903; Col. Burge and myself made an inventory of the spirits in the establishment of the

Old Nick Williams Co.; I have memorandum that I made from the note books we took; this is my report; I have here a list of stock; wholesale and retail, that we found on hand at that time; the establishment was then located where it is now; same building; some additions made to building since then; in making the examination we were not able to do the work as well as we wanted to; I have full report that we made of these goods; showing the amount of spirits in process of rectification as shown by Form #64, and the amount we found by actual inventory, and the difference, and as I remember there is nothing else in report; found in the wholesale stock rect. stamp #560264, O. N. W. Co. Rect., wine gallons 49.61, marked whiskey, proof 90, proof gallons 44.61, wantage 6.51 gals. 2nd package, stamp #7933461; O. N. W. Co.; rye whiskey; wg. 46; proof 90; p/g 41.40; wantage 3 gals. 3rd Stamp #7933460; O. N. W. Co.; rye whiskey; w g 46; proof 90; p g 41.40; wantage 2 gals. 4th Stamp #7933458; O. N. W. Co.; rye; w g 45; 90%; p g 40.50; wantage 1½ gals. 5th Stamp #7934145; O. N. W. Co.; Corn; w g 48; proof 90; p g 43.20; wantage 2 gals. 6th. Stamp #460238; O. N. W. Co.; whiskey; w g 50.88; proof 90; p g 45.80; wantage 7.50 gals. 7th. Stamp #560243; O. N. W. Co.; whiskey; w g 50.88; proof 90; p g 45.80; wantage 8 gals. 8th. Stamp #560240; O. N. W. Co.; rect., whiskey; w g 50.88; proof 90; p g 45.80; wantage 8.50 gals. 9th. Stamp #560244; O. N. W. Co., rect.; whiskey; w g 51.56; proof 90; p g 46.40; wantage 7 gals. 10th. Stamp #560239; O. N. W. Co. rect.; whiskey; (201) w g 50.88; 90 proof; p g 45.88; w 9.50 gals. 11th. Stamp #560233; O. N. W. Co.; whiskey; w g 50.10; proof 90; p g 45.41; w 9 gals;

The following packages bore the stamps of the O. N. W. Co., and if there are any changes I will call that out: Stamp #560232; whiskey; w g 49.66; proof 90; p g 44.60; w 21 gals. Stamp #560227; whiskey; w g 49.86; proof 90; p g 44.88; w 8.50 gals. Stamp #560252; whiskey; w g 49.61; proof 90; p g 44.65; w 8 gals. Stamp #560255; whiskey; w g 49.61; proof 90; p g 44.65; w 6.50 gals. Stamp #6365148; whiskey; w g 49.10; proof 90; p g 44.19; w 9 gals. Stamp #6365160; whiskey; w g 49.10; proof 90; p g 44.19; w 6.50 gals. Stamp #560249; whiskey; w g 49.61; proof 90; p g 44.64; w 7.50 gals. Stamp #560299; Corn, w g 45.90; proof 90; p g 45.90; proof gals. are same as wine gals. hence the proof would have to be a hundred; w 3.50 gals. Stamp 560296; corn; w g 53.80; proof 90; p g 48.40; w 3.50 gals. Stamp #560295; corn; w g 53.80; proof 90; p g 48.40; w 3.50 gals. Stamp #9235829; whiskey; w g 46; proof 90;

p g 41.40; w 2.50 gals. Stamp #561142; whiskey; w g 52; proof 90; p g 46.80; w 3 gals. Stamp #561524; corn; w g 46.35; p g 41.50; proof 90; w 3 gals. Stamp #9234125; corn; w g 46; proof 90; p g 41.40; w 3 gals. Stamp #8607-751; corn; w g 47; proof 90; p g 42.30; w 4 gals. Stamp #560294; corn; w g 50.04; proof 90; p g 47.04; w 2.50 gals. Stamp #1154118; corn; w g 51.50; proof 88; p g 45.32; w none. Stamp #908372; corn; w g 48.50; proof 88; p g 42.68; w ½ gals. Stamp #7933160; corn; w g 46.50; proof 90; p g 41.85; w 3 gals. Stamp #9235802; corn; w g 47; proof 90; p g 42.30; w 2 gals. Stamp #7933495; corn; w g 44; proof 90; p g 39.60; w 6.50. Stamp #9234131; corn; w g 48; proof 90; p g 43.20; w 3. Stamp #860172; corn; w g 48; proof 90; p g 44.10; w 4. Stamp #9234192; corn; (202) w g 46; proof 90; p g 41.40; w 2.50. Stamp #20-834; rye; w g 10; proof 90; p g 9; w 5.50. Stamp #20838; rye; w g 10; proof 90; p g 9; w 4.50. Stamp #8603966; apple brandy; w g 47.50; proof 90; p g 42.75; w 3.50. Stamp #2771862; rye; w g 31; proof 90; p g 27.90; w 8. That appears to be all the wholesale stock.

Retail stock: Stamp #B20809; O. N. W. Co. rect.; rye; capacity 10 gals; wantage 3 gals.; net w g 7; proof 90. Stamp B20802; rye; capacity 10; w 4; net w g 6; proof 90. Stamp #3640101; rye; capacity 46; wantage 12.50; net w g 33.50; proof 90; Stamp #3640178; O. N. W. Co.; rye; capacity 46.50; wantage 28; net w g 18.50; proof 90; Stamp #3640-180; O. N. W. Co.; Rect.; rye; capacity 42; w 9.50; net w g 32.50; proof 90. I have next cask #21 of D. D. Sherriff, and the number of the distillery appears to be 4520, tax paid stamp #620052; corn; capacity 45; w 28; net w g 17; proof 100; cask #24, tax paid stamp #620055; D. D. Sherman (that is my recollection, have written Sherriff) marked corn whiskey; capacity 45; w 41; net w g 4; proof 100; Rectifier stamp on next package #7175183; O. N. W. Co. Rect.; whiskey; capacity 46; w 9; net w g 37; proof 90; Next package R. S. #7176251; O. N. W. Co. Rect.; corn; capacity 45; w 35.50; net w g 9.50; proof 90; R. S. #560281; corn; O. N. W. Co.; capacity 51.50; w 8.50; net w g 42; proof 90. Cask R. S. #7176261; O. N. W. Co. Rect.; whiskey; capacity 46.50; w 35.50; net w g contents 11; proof 90; Stamp #560-234; O. N. W. Co.; apple brandy; capacity 51; w 11.50; net w g 39.50; proof 90. R. S. #8603975; O. N. W. Co.; rye; capacity 47.50; w 5; net w g contents 42.50; proof 90. Stamp #7933457; O. N. W. Co.; corn; capacity 45; w 2.50; net w g contents 42.50; proof 80. R. S. #9234139; O. N. W. Co.; (203) Rect.; corn; capacity 46.50; w 2.50; net w g contents

44; proof 90; R. S. #9234806; O. N. W. Co.; corn; capacity 49; on this package I have here marked the wantage 44 and net wine gallons contents 5 which I am of the opinion is a mistake. It appears that the net wine gallons has been taken for the wantage. I am of the opinion it should be wantage 5 wine gallons 44. Stamp #5366059; O. N. W. Co.; corn; capacity 49; w 9; net w g 40; proof 90. #7933457; O. N. W. Co.; rye; capacity 45; w 2.50; net w g contents 42.50; proof 90. That is through the list I have. These same packages appear, that is the wholesale stock transferred to the O. N. W. Co. on June 30th. They appear to have been transferred from the Old Nick Williams Co. unincorporated to the Old Nick Williams Co., incorporated. Those two bearing tax paid stamps #620052 and the other #620055—I am not sure about those. I give below from the wholesale liquor dealers' book of the O. N. W. Co. the serial number of the packages charged off to retail from July 1, 1903, to Sept. 3, 1903. Stamp #1458-189; O. N. W. Co.; inspected by Z. C. Davis; Aug. 6, 1903; w g 47; p g 42.30. R. S. #1195926; O. N. W. Co.; inspected by Z. C. Davis; Aug. 6; w g 50.50; p g 45.45. Stamp #1195-927; O. N. W. Co.; inspected Aug. 6; Z. C. Davis; w g 52.50; p g 47.25. R. S. #1195928; O. N. W. Co.; inspected Aug. 8; Davis; w g 50; p g 45; R. S. #1458191; O. N. W. Co.; inspected Aug. 8; Davis; w g 48; p g 43.20. Those five are all that I find transferred prior to Sept. 1st. I inspected three of the packages bearing those numbers on April 22, 1905, to-wit: #1195926, and it contained 48.50 w g same amount as when first inspected. Another bearing R. S. #1195927, and it contained 6.50 gals. Another bearing R. S. #1195927 and (204) it contained 25.50 w g; total for the three of 80.50 gallons on April 22, 1905. The next packages I found charged off to retail were Sept. 2, 1903, four packages; charged to O. N. W. Co. to retail. #1221947; inspected by J. Will Jones; June 25, 1903; w g 47.50; p g 43.22; corn; #1221-949; inspected by Jones; June 25, 1903; w g 47.50; p g 42.75; marked corn whiskey. #1221950; inspected Jones; June 25, 1903; w g 47; p g 42.30. #1458190; inspected Z. C. Davis; Aug. 6, 1903; w g 46; p g 41.80. The following charged off to retail subsequent to July 1, 1903. Oct. 1, 1903; Stamp #1154192; inspected Davis; Aug. 8; w g 47; p g 42.30. #1158193; inspected Davis; Aug. 8; w g 46; p g 41.40; marked corn whiskey. R. S. #1158194; inspected Davis; Aug. 5; w g 49; p g 44.10 or 44.16, could not tell which. #1602402; inspected Davis; Aug. 18; w g 47.50; p g 43.75; corn whiskey. R. S. #1602414; inspected Davis; Aug. 21, 1903; w g 45; p g 40.50; corn whiskey; R. S. #1456199; in-

spected Davis; Aug. 12, 1903; w g 48.50; p g 43.65; rye whiskey; R. S. #1456200; inspected Davis; Aug. 12, 1903; w g 49; p g 44.10; rye whiskey. #1602418; inspected Davis; Aug. 25, 1903; w g 46; p g 41.40 or 41.46, not able to tell which; corn whiskey. #1221948; inspected by J. Will Jones; June 25, 1903; w g 47; p g 42.30. Charged off Oct. 26, 1903; Stamp #1195948; inspected J. L. Council; Oct. 26, 1903; w g 53; p g 46.80; corn whiskey; Nov. 16, 1903; R. S. #1195-950; inspected Council; Nov. 2nd; w g 55.50; p g 45.45; corn whiskey. Stamp #1763817; inspected Council; Nov. 5, 1903; w g 46.50; p g 41.85; Stamp #1763818; inspected Council; Nov. 7, 1903; w g 45; p g 40.50; Charged off Nov. 18th; stamp #1763829; inspected Council; Nov. 16, 1903; w g 45.50; p g 41.85; both marked corn whiskey. Stamp (205) #1763844; inspected Council; Nov. 18, 1903; w g 46; p g 41.40; corn whiskey. R. S. #1763839; inspected Council; Nov. 18, 1903, w g 45; p g 40.50. Stamp #1763-841; inspected Council; Nov. 18, 1903; w g 45; p g 40.95; corn whiskey. Stamp #1763842; inspected Council; Nov. 18, 1903; w g 45; p g 40.50; corn whiskey. Stamp #1763843; inspected Council; Nov. 18, 1903; w g 45.50; p g 40.95; corn whiskey. Charged off Nov. 21st, R. S. #1195935; inspected Davis; Sept. 18th; w g 51; p g 45.90; rye whiskey. Charged off Dec. 10, 1903; stamp #1763840; inspected Council; Nov. 23, w g 46.50; p g 41.85; corn whiskey. Stamp #1763849; inspected Council; Nov. 23; w g 47.50; p g 42.75. Charged off Dec. 10, 1903; inspected Council; Nov. 25; w g 46.50; p g 41.85. Charged off Dec. 14, 1903; stamp #1763814; inspected Council; Nov. 2; w g 47.50; p g 42.75; corn whiskey—these stamp numbers were all without my calling them out to be issued to the O. N. W. Co. Their own product inspected Council; Nov. 2nd; w g 45.50; p g 45.95. Dec. 15, 1903; stamp #1763847; marked corn whiskey; inspected Council; Nov. 23rd; w g 46; p g 41.40. Charged off same date; stamp #1195955; inspected Council; Nov. 23rd; w g 50; p g 45; Stamp #1195934; inspected Davis; Sept. 18; w g 51; p g 45.90; marked rye whiskey. Stamp #;;95937; inspected Davis; Sept. 18; w g 51; p g 45.90; rye whiskey. Stamp #1763811; inspected Council; Nov. 27; w g 46; p g 41.40; corn whiskey. Stamp #1763-870; inspected Council; Dec. 8; w g 44; p g 39.60; corn whiskey. Stamp #1763872; inspected Council; Dec. 8; w g 48; p g 43.20; corn whiskey. Stamp #1195970; inspected Council; Dec. 16; w g 50; p g 45; Stamp #1763890; inspected Council; Nov. 15; w g 48; p g 43.20; corn whiskey. Stamp (206) #1763891; inspected Council; Dec. 15; w g 46;

p g 41.40; corn whiskey. Stamp #1763892; inspected Council; Dec. 15; w g 46.50; p g 41.85; corn whiskey. The date I have is a package charged off April 18, 1904; stamp #1372-707; inspected J. W. Hendricks; April 18, 1904; w g 51.62; p g 48.70; corn whiskey. Next May 24, 1904; stamp #2703-108; inspected Hendricks; May 23; w g 43.55; p g 43.55. Stamp #2703109; inspected Hendricks; May 23rd; w g 46.15; p g 36.92; corn whiskey. Next Sept. 16; stamp #3168558; inspected C. D. Deaver; Sept. 15; w g 44.27; p g 28.78; rye whiskey. Sept. 16th; stamp #3158662; inspected Deaver; Sept. 15; w g 45.64; p g 36.52; rye whiskey; Stamp #3158559; inspected Deaver; Sept. 15; w g 48.8; p g 43.27; rye whiskey. Sept. 26; stamp #3168583; inspected Deaver; Sept. 23; w g 46.91; p g 37.52; rye whiskey. Dec. 14; stamp #1195936; inspected Davis; Sept. 18; 1903; w g 52.50; p g 47.22; rye whiskey. Stamp #1195933; inspected Davis; Sept. 18; w g 51; p g 45.90. Stamp #1602451; inspected Davis; Sept. 18, 1903; w g 49; p g 44.70; rye whiskey. Stamp #1602450; inspected Davis; Sept. 18; w g 46; p g 41.40; rye whiskey. Stamp #1602449; inspected Davis; Sept. 18; w g 45; p g 40.50; rye whiskey. Stamp #1195-938; inspected Davis; Sept. 18; w g 51; p g 45.90; rye whiskey. Stamp #1195939;—am not sure about the third figure from the last—inspected Davis; Sept. 18; w g 51; p g 45.90; rye whiskey. Stamp #1195953; inspected Davis; Sept. 18; w g 48.50; p g 43.55; corn whiskey. Stamp #1602-426 inspected Davis; same date; w g 46; p g 41.40; corn whiskey. Stamp #1602452; inspected Davis; same date; w g 48.50; p g 51.65; corn whiskey. Stamp #1602433; inspect-
(207) ed Davis; same date; w g 46; p g 41.40; rye whiskey. Stamp #1602432; inspected Davis; same date; w g 45; p g 40.53; corn whiskey. Feb. 24, 1905; stamp #3632664; inspected J. A. L. Sherman; Feb. 24, 1905; w g 47.80; p g 33.46; April 7, 1905; Stamp #1602475; inspected Council; Oct. 1, 1903; w g 43; p g 38.70; rye whiskey. April 7; stamp #1763804; inspected Council; Oct. 20, 1903; w g 45; p g 40.50; rye whiskey. There are no packages of brandy shown on this transcript or on the books to have been charged off within the above dates, but some of the packages were transferred onto new book June 1, 1904, and one there appears to be apple brandy. Don't remember stamp number. All those charged off to retail are either marked or ticketed corn whiskey or rye whiskey, but referring to the one that had been transferred onto new book June 1, 1904, I found it marked apple brandy. This one I have just called out. On the inventory I think I found another package marked apple brandy in the retail

stock. The retail stock of the old company was transferred onto the wholesale liquor dealers' books of the new; found none of these packages so transferred to be charged off as brandy. I took inventory the 22nd of April, 1905. Found quite a number of the packages that I have just enumerated as having been charged off to retail in the retail department when I took that inventory. They are as follows, as I remember: R. S. #B1-159928; corn whiskey; original contents 50; proof 90; present contents 25.50; proof 88. Stamp #1763892; corn whiskey; o c 46.50; o p 90; p c 41; p p 89. Stamp #1763829; corn whiskey; o c 46.50; o p 90; p c 18.50; p p 90; date of stamp 11-16-1903. Stamp #3632664; corn whiskey; o c (208) 48.50; o p 70; p c 5.50; p p 69; date of stamp 2-4-1905; Shermer, Gauger. #2703109; corn whiskey; o c 46; o p 80; p c 10.50; p p 79; date inspection 4-23-1904; Hendricks gauger. Stamp #1763870; corn whiskey; o c 44; o p 90; p c 6; pp 89; date of stamp 12-8-1903; Council, gauger. Stamp #2703108; corn whiskey; o c 43.55; o p 100; p c 25.50; p p 99; stamp date 5-23-1904; Hendricks, gauger. Stamp #1763872; corn whiskey; o c 48; o p 90; p c 39.50; p p 89; stamp date 12-8-'03; Council gauger. Stamp #1195950; o c 50.50; o p 90; p c 37.50; p p 90; inspected 11-2-1903; Council gauger. Stamp #1763848; corn whiskey; o c 46.50; o p 90; p c 18; p p 90; 11-23-1903; Council gauger. Stamp #1763817; corn whiskey; o c 48.50; o p 90; p c 14; p p 90; 11-5-1903; Council gauger. Stamp #1763842; corn whiskey; o c 45; o p 90; p c 21; p p 89; 11-18-1903; Council gauger. Stamp #1372707; o c 52; o p 75; p c 6.50; p p 76; corn whiskey; 4-18-1904; Hendricks gauger. Stamp #1763811; o c 46; o p 90; p c 12.50; p p 89; 10-27-1903. Council gauger; corn whiskey. Stamp #1763843; corn whiskey; o c 45.50; o p 90; p c 22.50; p p 89; 11-8-1903; Council gauger. Stamp #1763839; oc 45; o p 90; p c 9.50; p p 89; 11-18-1903; Council gauger. Stamp #1763841; corn whiskey; o c 45.50; o p 90; p c 8; p p 89; 11-18-1903; Council gauger. Stamp #1763891; corn whiskey; o c 46; o p 90; p c 7; p p 90; 12-15-1903. Stamp #1763890; corn whiskey; o c 48; o p 90; p c 9.50; p p 90; 12-15-1903; Council gauger. Stamp #3-168559 rye whiskey; o c 48; o p 90; p c 5; p p 87; 9-5-1904; Deaver gauger. Stamp #3168562; rye whiskey; o c 46; o p 80; p c 4; p p 76;—it appears to be—9-15-1904; Deaver gauger. Stamp #3168583; rye whiskey; o c 47; o p 80; p c 9.50; p p 79; 9-23-1904; Deaver gauger. Stamp #3168558; (209) rye whiskey; o c 44.50; o p 65; p c 28; p p 66; 9-15-1904; Deaver gauger. Stamp #1602402; o c 47.50; o p 90; p c 10.50; p p 88; 8-18-1903; Davis gauger. Stamp #1763-

818; corn whiskey; o c 45; o p 90; p c 7; p p 90; 11-7-1903; Council gauger. Stamp #176334; corn whiskey; I think it is o c 46; o p 90; p c 5.50; p p 90; 11-18-1903; Council gauger. Stamp #1195955; corn whiskey; o c 50; o p 90; p c 5.50; p p 90; 11-23-1903; Council gauger. Stamp #1221-947; corn whiskey; o c 47.50; o p 91; p c 17; p p 90; 6-27-1903; Jones gauger. Stamp #1763847; o c 46; o p 90; p c 36; p p 90; 11-23-1903; Council gauger. Stamp #11959-970; corn whiskey; o c 50; o p 90; p c 43.50; p p 90; 12-15-1903; Council gauger. Stamp #1438199; corn whiskey; o c 48; o p 90; p c 44.50; p p 90; 8-12-1903; Davis gauger. Stamp #1602414; corn whiskey; o c 45; o p 90; p c 7.50; p p 89; 8-21-1903; Davis gauger. Stamp #1763849; corn whiskey I think o c 47.50; o p 90; p c 25.50; p p 88; 11-23-1903; Council gauger. Stamp #1195926; corn whiskey; o c 50.50; o p 90; p c 48.50; p p 90; 8-6-1903; Davis gauger. Stamp #1763871; corn whiskey; o c 45.50; o p 90; p c 42; p p 90; 12-8-1903; Council gauger. Stamp #1763852; corn whiskey; o c 46.50; o p 90; p c 35.50; p p 89; 11-25-1903; Council gauger. Stamp #1602418; corn whiskey; o c 46; o p 90; p c 39.50; p p 90; 8-25-1903; Davis gauger. Stamp #1221-948; corn whiskey; o c 47; o p 90; p c 43; p p 90; 6-25-1903; Jones gauger. Stamp #1602453; corn whiskey; o c 48.50; o p 90; p c 43.50; p p 89; 9-21-1903; Davis gauger. Stamp #1602426; corn whiskey; o c 46; o p 90; p c 42.50; p p 88; 9-11-1903; Davis gauger. Stamp #1602452; corn whiskey; o c 48.50; o p 90; p c 43; p p 89; 9-21-1903; Davis gauger. Stamp #1195927; o c 42.50; o p 90; p c 6.50; p p 87; 8-6-(210) 1903. Stamp #1195918; corn whiskey; o c 47; o p 90; p c 14.50; p p 91; 11-26-1903; Council gauger. Stamp #1602475; rye whiskey; o c 43; o p 90; p c 31; p p 91; 10-1-1903; Council gauger. Stamp #1763804; rye whiskey; o c 45; o p 90; p c 29.50; p p 90; 10-20-1903; Council gauger. Stamp #1602432; rye whiskey; o c 45; o p 90; p c 34.50; p p 88; 9-4-1903; Davis gauger. Stamp #1602433; rye whiskey; o c 46; o p 91; p c 12.50; pp 89; 9-7-1903; Davis gauger. Stamp #1602449; rye whiskey; o c 45; o p 90; p c 14.50; p p 90; 9-18-1903; Davis gauger. Stamp #1602450; rye whiskey; o c 46; o p 90; p c 29.50; p p 90; same date; same gauger. Stamp #1602451; rye whiskey; o c 49; o p 90; p c 43; p p 90; same date; same gauger. Stamp #1195938; rye whiskey; o c 51; o p 90; p c 42.50; p p 90; same date; same gauger. Stamp #1195935; rye whiskey; o c 51; o p 90; p c 50; p p 90; same date and gauger. Stamp #1195936; rye whiskey; o c 52.50; o p 90; p c 52; p p 89; same date and gauger. Stamp #1195939; rye whiskey; o c 51; o p

90; p c 36.50; p p 90; same date and gauger. Stamp #1195-933; rye whiskey; o c 51; o p 90; p c 36; p p 90; same date and gauger.

The total number of gallons charged off to retail from July 1, 1903, to April 22, 1905, according to my figures is 3176.02 wine gallons. Of this amount I found still on hand that date 1,360 gallons according to my figures. The total number of packages charged off was 67; of these I found on hand on the above date 55 either full or having still some spirits in them. I found on April 22, 1904, 22 barrels in the wholesale stock, in the neighborhood of that; not sure about the number. They bore stamps but had not been entered as disposed of. Am not sure that was rectifiers stamps. I found at that time 2024.43 (211) gallons in process of rectification. My recollection is that there was a shortage of about 180 gallons. Some of this was in barrels and some in the rectifying tanks. Some of these had stamps on them, except the clips. Those that had not, had gone through the process of rectification, I suppose.

(212) R. B. Sams (cross examination). Col. Burge and I went to Williams on July 25th I think, and took an inventory of the stock of the Old Nick Williams Company, unincorporated, which was in existence before the defendant company was incorporated. We made this inventory I have been referring to on that day. The stock we inventoried belonged to N. Glenn Williams doing business under the name of the Old Nick Williams Company as I understand it. The corporation of that name had been formed and it was going to take over this stock of N. Glenn Williams doing business as the Old Nick Williams Company. We were not taking the inventory, however, with a view to this transfer but the records show that they were transferred to the incorporated company by that name on July 21, 1903. We inventoried what we found in the retail and wholesale departments just as I have related it. Went back the 6th of July and found the same spirits there that I found on June 25th. Mr. Patterson and I were sent back. Did not go through the whole stock. Only the barrels in question. Examined a number of barrels. Found a quantity of spirits. Practically the same as on June 25th. The inventory I have just given contained the quantity of spirits in the retail and wholesale establishments but does not show the quantity in the process of rectification. Spirits in the process of rectification were the spirits that had been dumped for rectification.

(Redirect examination) I think a gallon of 10% spirits weighs nearly 8 pounds. The higher the proof the lighter it

is. It is lighter than water. The wholesale establishment, the retail establishment and the rectifier were all under the same roof. Mr. Hardin was present when I made inventory on April 22. Also Mr. Sheeke. They proofed the liquor in the retail department. The greatest variation in proof showed by that (213) record is 4 degrees and that is on only one package. Found the proof the same in almost every instance. Ran pretty close together. Some slightly above, some slightly below. Don't remember more than 2 degrees unless it is in that package. My recollection is that Hardin and Sheeke did all of the proofing. Defendant had paid his special tax as retail liquor dealer; also as wholesale liquor dealer. The wholesale and retail stock was kept separate. I mean in separate rooms. Did not see anything materially wrong when I made this examination. Proof was a little off but nothing unusual about that, however.

Mr. CHANDLEY (recalled). Identified form 52 A and B of the Old Nick Williams Company for May, 1905, as having been received in the collector's office for the 5th district. (It is admitted that this form was made out by D. E. Kennedy.) Witness also identifies form 52 B of the Old Nick Williams Company for June, 1905. (It is likewise admitted that this form was made out by D. E. Kennedy.)

G. W. SHEEKE (recalled). Was with Mr. Sams on April 22, 1905, when he made the inventory referred to by him. When on the stand yesterday. Observed rectifier's license, retail liquor dealer's license and wholesale liquor dealer's license. My recollection is that they were all posted up together on the lower floor of the building. Of course I did not take any special notice of that. Remember all of retail stock was on lower floor and part of second floor.

(Cross examination.) Am not sure but my recollection is that licenses were posted up on the lower floor. Don't remember seeing any posted up but at one place. The licenses I saw posted may have been at more than one place and some of them may have been old. Did not read them. I found that (214) the defendant company had a license to conduct the business of a retail liquor dealer for the year 1904-5, and also a license to do business as a wholesale liquor dealer for the same time, and also as a rectifier.

J. WILL JONES. Live at Fairview, Buncombe county. Rectifier and gauger, since November, 1901. Was assigned to

duty at rectifying establishment of the defendant company in Jan., 1902. Last work I did there was July 6, 1903. Last time I was there before that was June 25, 1903. Found R. B. Sams and Col. Burge there when I arrived. Got there a while before noon and remained until next morning. Saw Mr. Williams on the night of the 25th of June and talked to him with reference to the business of the company. Conversation I refer to took place in his parlor. We were speaking about several different positions in the service and Williams remarked that I had one of the best positions in the service. I replied that I did not think so that there were several positions that paid better salaries than mine. He said I could make from $4,000 to $6,000 per year. I said I did not see how I could make it. He replied we will give you 5 cents per gallon for what 25 barrels of whiskey you represent and furnish form 122 properly signed with clips and the capacities of the casks all properly filled out. You can make the entry on record 64 and do it in a minute and it will pay you $62.50. I made no reply to this statement. Ignored his proposition and there was quite a lengthy conversation between us with regard to other matters pertaining to the same line. He said the matter could be worked and was worked with wholesale stamps but it could be done with distilled packages. If I had accepted his proposition it would have been defrauding the Government out of the revenue that 25 barrels of spirits represent. He said that (215) he could make two transactions of that kind each week—we could make that. I went from that point next day to E. O. Species. Saw Mr. J. W. Sowers there on June 28. Repeated to him the same words that I have repeated here today in substance. I was down at Ronda, in Wilkes county, at his home. Next time I visited the rectifying plant of the defendant company was on July 4. Went there on request to make a dump of 56 packages on form 122. That was, as I understand it, to transfer the business to the new company. I have the result of my work there as far as I went. As I remember it the first thing I did I went into Mr. Williams' office and transcribed the data from form 122 to my scratch book. I called his attention to one or two errors on this form. I think in one instance, probably, there was no record of the proof of the spirits in the proof column and I believe I called his attention to an error in the stamp number in one or two places. After I had transcribed this to my scratch book I went to the rectifier and found the spirits of packages in different parts of the building. I asked him if I could have some assistance and he refused except a negro boy. Told me I could take him and use him. I was on the second floor of the rectifying plant

when I began my work. Proceeded with the work by taking the length of the barrels and then I went back and had not gotten very far with this work when he showed some disposition to object to the guage I was making. When I had gone over 16 packages but before I had gotten over these packages he began to curse saying it was a shame to have to pay money to the Government for such a guage as that. I replied that he was an old gauger and could take the rod and show me where I had made an error and I would correct it. Began to take the measure of the diameter of the barrels and he began again to curse (216) in the same manner. I told him I had come there as a gentleman to discharge my official duties and was going to do it and that if was not satisfied with my guage I would telegraph to the Collector for assistance. He replied that he wanted no such dam report. After I had finished that part of my work I took my rod and as I took it I remarked that I was ready to stop. He continued to curse in a way that I saw that I could not do the work properly and I told him that I would quit and he cursed me and told me to do so and I quit. I went immediately and telegraphed to the Collector the state of affairs and said it was impossible for me to continue the work. I made no record of all of the "outs" on my transcript that day made no memorandum of that except that I put on the barrels. Do not remember the number of gallons "out" except two of the barrels. The two that I remember the outage being on were the two that the greatest difference existed between my guage and Mr. Sams on the 6th. One of these packages I can swear positively to and the other I cannot. The number on this was 560249, 48.50 galls. My wantage on July 4, 12 gals. When I went back on the 6th the same package showed a wantage of 8 gals. a difference of 4. As I remember it package 6665148, either that or one of two others, 560243 or 560240, showed an outage of 8½ gals. on the 6th and an outage of 11 gals. on the 4th a difference of 2½ gals. Package 560243 showed a wantage on the 4th of 11 gals. and on the 6th of 7½ gals. I did not take the wantage of all of these packages on the 6th. Took it only on 4 packages.

(Cross examination.) I made a statement on the 6th in the presence of Mr. Sams and Mr. Patterson that I was not absolutely satisfied with my wantage rod, that it was stiff, that it did not work smooth and nice. Upon examination of this rod it appears to have been repaired though I know nothing of (217) when it was repaired. Purchased it from Mr. J. A. White. Used it until I left a part of it in one of Mr. Williams' barrels. I did not have it repaired. Used it for 2 years and

never noticed that it had been repaired. Rectifiers and gaugers rarely used wantage rods. In most instances they got the wantage by weight. I have no unfriendly feeling towards Mr. Williams. Don't think I have been making myself very active in this case. Do not entertain the warmest feelings for him. I think I told Mr. Clayton in this court room during the trial that Mr. Williams was the meanest man I ever saw, or something to that effect. I spoke from his general reputation. I have said that on my report this case was instituted and I say so yet. I have said that the decision of this case depended upon the matter of veracity between Mr. Williams and myself as far as my work pertains to it. I never had any trouble in North Carolina before going to Texas in 1879, except concerning some slanderous reports with reference to my sister. I was accused in 1873 of taking some money out of Dr. Allen's money drawer. It was this way. I with some other young men were all drinking, card playing and carousing in his store one night. Next morning he sent for me and said that there was a dollar bill taken from his cash drawer last night and some of us got it. I told him I knew nothing at all about the matter and asked him to examine my purse, showing it to him. I had a dollar bill in it and Dr. Allen claimed it, and I do not know whether he took it or I kept it. It is my remembrance that he took it. I submitted to it because I had no way to clear myself under the circumstances.

J. W. Sowers. Live at Ronda in Wilkes county. Wholesale liquor dealer in June, 1903. J. W. Jones had a conversa-
(218) tion with me on the last Sunday in June, 1903, in reference to a proposition made him by Mr. Williams, concerning "dumping" goods. Said that Williams had said to him that he had one of the best jobs in the service, that if he would take clips from barrels in lots of 25 that he would give him 5 cents per gallon for using these clips and furnish all data for making out his report to the Government and there would be no trouble whatever about it and he would thereby make something like $62 on every lot of 25 barrels he handled that way.

J. J. Mackey, Rufus Ashworth, J. G. Huff, S. A. Martin, Claybrook James, and J. E. Rankin all testified that they were acquainted with J. W. Jones and that his character was good.

(Government rests.)

Defendant's Evidence.

Dr. T. A. Allan, Dr. R. L. Cooper, Dr. C. M. McCracken, Jason Ashworth, Robert C. Clayton, B. F. Merrill, James Reese, J. R. Grant, S. J. Ashworth, W. C. Early, all testified that they knew J. W. Jones and that his character was bad.

A. S. Patterson. Was Deputy Collector in revenue service for several years until a few months ago. In that capacity visited the rectifying establishment of the defendant company. Went in company with Messrs. McCoy, Broadnax and Zack Davis, all in Revenue service. Went to Advance one night and walked through the country 16 miles and laid out on Mr. Williams' premises and watched and searched and examined the place. Found everything all right. Went at suggestion of District Attorney and partly from a sense of duty. Was also there with Mr. Sams in July, 1903. After Mr. Jones and Mr. Williams, it seems, had some difficulty. We arrived first and Jones afterwards. As soon as he came said he would not (219) be sure his gauging rod was correct. That it was out of fix or something was wrong with it. We proceeded to try our rods and his. I think we had measured two or three barrels when his rod broke and part of it was left in the barrel and he had to stop. Mr. Sams and I went on and measured the barrels and bungs in two different ways. Went over 22 or 23 and found a difference of from ½ gallon to 4 gallons. Found one barrel a little less than Jones had made it. Sams and Col. Berge had made the gauge previous to this and our gauging was practically the same as theirs. Sams and I made our report to the Collector.

(Cross examination.) First time at Williams was in 1902 or 1903. He was not distilling then. Had his rectifier running. Did not find anything wrong. Made a thorough test. Stayed there till we starved out. You asked me why we did not catch Glenn Williams and I said that if you wanted it done I would try again and we did so. No one present when we had this conversation. It was about the time I caught Sprinkle. Never had any trouble in catching anybody but Mr. Williams. Not caring anything about the defense. Did not call up Casper the night of the day Williams was on the stand and tell him to come down here on account of Woodward. I called him up but did not tell him Woodward was ruining Williams. Did not mention Woodward's name. Some one asked me, probably Williams or Yates, that was the reason I did it.

J. C. PINNIX. Was Deputy Revenue Collector during the years 1903 and 1904. As such it was my duty to visit the defendant's rectifying establishment. Did so 13th of July, 1903. Saw Government witness Minor there. I received a telegram to seize the rectifying establishment of the defendant corporation on Saturday the 11th and on the 13th following I proceeded to the place and arrived there in the evening (220) and began to take inventory of stock. Took me about 2 days. On the 14th about noon Mr. Williams came into the rectifying establishment and said there was some whiskey outside and wanted to know if I would seize it if he bought it. Told him I would. I went out and walked 8 or 10 steps from the building. My recollection is that there were two loads of whiskey. I examined the whiskey and saw it was stamped all right. Sent there from town of Shore. Williams said that if I was going to seize it he would not buy it. Said he was going to bond the rectifier in a few days and would store this particular whiskey and I think they carried it out there and stored it. Mr. Minor stood about there all the time I was there. Talked occasionally about a machinery trade. He also said something about my right to seize spirits to the effect that I only had orders to seize what whiskey I found there and thought I ought not seize what was brought there after I got my orders. When I went to examine the stamps on the barrels Minor was not less than 10 steps, probably 20 feet away. I did state to the driver that the whiskey was stamped all right. Minor was then 2 or 3 steps away; I was present when the distillery that has been spoken of in the testimony was first started up. Started it up myself. It is run in name of D. E. Kennedy. It ran on a 101 bushel capacity a day something like a month. Then the capacity was reduced to 21 bushels per day. I took the necessary steps to reduce its capacity. Visited the distillery after that once a month or oftener as long as it was in operation. It started in March, 1904. I went out of the service August 10 of the same year. I made a careful and all necessary examinations of the distillery and the premises. Found everything all right. Never gave any notice of the times I intended to make my examination. Also visited the rectifying establish- (221) ment of the defendant company. After I released the rectifier about July 21st I was not there any more until November, 1903. Then received orders from the Collector of the fifth district to visit the rectifyers in my district and inventory all spirits in dump and report to his office. Made my first visit about the 10th of November and repeated my visits about 2 times a month until I went out of office. Took an inventory of everything each visit including a thorough examina-

tion of packages, etc. Found nothing wrong. Found retail dealer's license properly posted in retail department; wholesale liquor dealer's license in wholesale department and rectifyer's license in rectifying department. Have known defendant, N. Glenn Williams, for 15 years. Character is good.

(Cross examination.) At the time I seized the rectifier and the two loads of whiskey were hauled into the yard, I did not see anyone motion or tell the drivers to keep back. Think there were 8 barrels in a load.

G. W. Sheek. Am Deputy Collector. Assigned to duty under revenue agent. Held position for two and one-half years. Part of my duties are to inspect rectifyers, distilleries, etc. Williams, N. C., is in my district. Visited distillery of D. E. Kennedy 21st of April, 1905, with R. B. Sams. Went to distillery about midday or a little later and remained until evening of the 22nd. Gave no one at distillery notice that we were coming. We inspected the distillery and looked around there a little while. Sams inspected the store-keeper's books and the distiller's books. He and I inspected the premises together to see if we could discover any violations of the law. Did not discover anything wrong. Then went to the rectifying establishment of the defendant company and remained until night and were there next day. Checked up the rectifyer's books. Made inventory of stock in retail and wholesale es-
(222) tablishments and rectifier. The morning of the 22nd Mr. Hardin came out and he and I together proofed and took inventory of the retail stock, in wholesale packages. We found no occasion to make a seizure. Sams made a report and the report is on file.

(Cross examination.) This was my first visit to the distillery to make a general inspection and to see principally to whom spirits had been sold. All sales had been made to the defendant company. Don't remember how many packages had been sold. We then went to the rectifying house and found what was reported by Mr. Sams. Did not see any retail stock in retail packages.

R. H. Hardin. Was Deputy Collector in Revenue service in April, 1905. Occupied that position for three years prior to that time. My duties were to examine distilleries, rectifyers, retail dealers, etc. Went to Williams April 22, 1905, at request of Revenue Agent Chapman. Inspected and examined the rectifying establishment of the defendant com-

pany. Took the wantage on packages and proofed the entire stock. We only took the wantage and inventoried packages containing 5 gallons or more. Ordinarily paid no attention to retail packages. We found the business straight and according to law. I had been there before. First visit something like a year before. Examined distillery and rectifier. Made thorough examination. Rectifying plant about 500 yards from the distillery. Found wholesale, retail and rectifier's licenses in building. Were posted in their respective departments. Retail stock separate from wholesale stock. In different room. Made one other visit between the two above named. Did not make thorough examination. So far as I went found everything straight. Regulations require us to report only when irregularities are found. Made no report because I found no irregularities.

(224) R. F. Fox. Live in Asheville, N. C. Been storekeeper and gauger 4 years. Stood Civil service examination. Assigned to duty at C. E. Kennedy's distillery at Williams, N. C. Was there about a month when Johnson was distiller. No low wine tub in distillery when I was there. Never heard Johnson say anything about it. I had charge of meal and other material used in making mashes. Distillery was running on 101 bushel capacity. Kennedy notified Department when capacity was reduced to 21 bushels. The mill of the defendant company was located right at the distillery. Fifteen or twenty feet of space between. Meal was conveyed from the mill to the distillery building by an elevator and conveyor,—into meal room. This room was kept locked by me while there. Regular Government lock. Saw to it that only requisite quantity of material was used for each mash. Looked after the matter myself. After the spirits were distilled they were conveyed to the whiskey tub and then by way of a pipe elevated some 15 feet above the ground to the cistern room. Whiskey tub kept locked. Never allowed more than the proper amount of material to go into the mash tub while I was there. Impossible for it to have been done without my knowledge. Carried keys in my pocket. All whiskey distilled was conveyed to cistern room. Always present when distillery was in operation.

(Cross examination.) Made about the same amount of spirits every day. Little variation. Have known it to vary as much as a barrel. Got below 80%. Don't know what the result of the months' work was. Mr. Parker succeeded me. Used some kind of yeast. Johnson made it. Never saw whiskey tub run over while I was there. Five hundred gallon tub

would do just as well as 700 gallon tub. Cannot see any reason why they should change 500 gallon tub for 700 gallon tub.

(225) T. C. McCoy (recalled by defendant), R. B. Sams, J. M. Bailey and Roscoe Chandley, all testified that they knew R. F. Fox and that his character was good.

Milas Parker. U. S. Store-keeper and Gauger. Passed Civil service examination. Assigned to duty as Store-keeper at D. E. Kennedy's distillery May 25, 1904, by Collector Harkins. Succeeded R. F. Fox. Remained until latter part of July, same year. Duties required me to carry keys to Government locks and see that no more material was mashed in and used than the surveyed capacity of the distillery permitted. Distillery ran on 21 bushel capacity while I was there. Am satisfied that no more material was used than that amount daily. Also that every drop of whiskey distilled from that amount was carried from the distillery in a copper pipe to the cistern room. Impossible for material to be brought into distillery and used without my knowledge. J. W. Hendricks was gauger while I was store-keeper. He had charge of cistern room and gauged and barrelled and stamped all spirits in cistern room.

F. B. Lawson. U. S. Store-keeper and Gauger for several years. Stood Civil service examination. Was assigned to duty as Store-keeper by Collector Harkins at D. E. Kennedy's distillery on July 25, 1904. Remained continuously in discharge of the duties of that office until April 25, 1905. Had charge of keys of Government locks in the distillery and saw to it that no more material was mashed in than was permitted, to-wit: 21 bushels per day which was the capacity of the distillery while I was there. Am positive that no material could have been used while I was in charge as store-keeper without my knowledge and also that every drop of whiskey distilled from each 21 bushels of material which was weighed up by me daily was transferred from distillery through a copper pipe to (226) the cistern room. The distillery building was so constructed that it was impossible for the distiller to use excessive material or to abstract any spirits from the whiskey tank or other place in the distillery without my knowledge. Was also in charge of the same distillery operated by D. C. Foster during the month of October, 1905, having been relieved from duty on the 31st of that month. Weighed up material which was in fermenting tub which was distilled on the 1st and 2nd days of November, 1905. Distillery then running at 101 bushel capacity. Am satisfied that no more than 101 bushels

of material were used in 2 sets of fermenting tubs from which runs were made on the 1st and 2nd of said month. Was succeeded as Store-keeper by T. W. Landreth on the 1st of November but he was with me a day or two before that time—I having left the distillery on the morning of the first.

J. W. Hendricks. U. S. Gauger. Stood Civil service examination. Was assigned to duty as Gauger at D. E. Kennedy's distillery by Collector Harkins when distillery started up in March, 1904. Remained till August following. Had charge of keys to Government locks in cistern room and it was my duty to weigh up and barrell all spirits which came into said cistern room from the distillery and to properly mark, stamp and brand the same and, together with the Store-keeper, warehouse it. Also to make regular reports of the products of the distillery to the Collector. I am satisfied that I barrelled and warehoused all of the spirits that came into the cistern room from the distillery while I was in charge of it and it would have been impossible for anyone to have abstracted any spirits from the cistern room without my knowledge. Said spirits were conveyed to the cistern room through a copper pipe elevated some 15 feet or more above the ground and there was no (227) way for spirits to be abstracted from said pipe while I was in charge. Also acted as rectifying gauger at the rectifying house of the defendant company during the time above mentioned. It was my duty as such to guage packages for which application had been made to dump on form 122 and to see that said packages were in all respects similar to the descriptions of them on said form, and also to gauge and stamp all packages which the company wished to withdraw from rectification and make all the proper entries of both transactions on form 64, which I did. There were no irregularities or violations of the law at said distillery or rectifying house while I was discharging these duties.

C. P. Deaver. U. S. Store-keeper and Gauger. Stood Civil service examination. Was assigned to duty by Collector Harkins as Gauger at D. E. Kennedy's distillery on August 20, 1903. Remained until last of September of same year. My duties as such Gauger required me to carry keys to all Government locks, keep store room locked when I was not present and that I weigh up, barrel, mark, stamp and brand all spirits which came into the cistern room from the distillery which I did. Am satisfied that every gallon of spirits which came into cistern room from said distillery while I was in charge as said store-keeper, was duly barrelled, marked, stamp-

ed, branded and warehoused according to law and regular reports thereof made to the Collector. I am positive that there was no way for any spirits to have been extracted from said cistern room while I was in charge without my knowledge and that none was so abstracted. Also acted as rectifying gauger at rectifying house of defendant company during above time. Was required to do so by Collector. My duties there were to examine and gauge packages which were to be dumped for (228) rectifycation and verify the description and condition of the same as shown on form 122; and also to gauge and stamp all packages which were to be withdrawn from rectification and to make the proper reports on form 64 of my work, all of which I did. Never have discovered any irregularities or violations of the law at said rectifying house while I was there in discharge of my duties or at any other time.

J. L. Council. U. S. Rectifier and Gauger. Stood Civil service examination. Assigned to duty by Collector Harkins in territory embracing rectifying house of defendant company on October 1, 1903. Remained till latter part of March, 1904. Had 3 other rectifying houses in my district, one at Shore, one at Smith Grove and one at Advance. During that time my duties were to proof all packages which were to be dumped for rectification and compare the marks, stamps and brands on the same with the descriptions and conditions on form 122. Also to stamp, mark and gauge all packages that were to be withdrawn from rectification during said time and make due entries of my work on form 64 and due reports to the Collector. During said time discovered no violations of law or irregularities at said house.

Z. C. Davis. Rectifier and Gauger. Stood Civil service examination. Assigned to duty by Collector Harkins at rectifying house of defendant company August 1, 1903. Remained till October 1st following. Part of my duties required me to empty all packages in said house which had been dumped for rectification and to gauge and examine the marks, stamps and brands upon said packages to see that they corresponded with the descriptions of said packages given by the rectifier on form 122 and 52 A and B required by law to be kept by said (229) rectifier. What I mean by emptying such packages is that I measured the contents and tested the strength of each package. Also examined and proofed all packages dumped for rectification while I was in charge as well as those withdrawn from rectification and make proper entries of examination upon form 122 and form 65 according to law. Discovered no viola-

tions of law or irregularities at such rectifying house during the time I was there in charge of same.

T. W. Landreth. U. S. Store-keeper. Assigned to duty by Collector Harkins at distillery of D. C. Foster on November 1, 1905. Was present when Revenue Agent Chapman came to said distillery on said date. The beer from one set of fermenting tubs had already been distilled when he arrived and was engaged in distilling beer from 2nd set of tubs. The distiller in charge requested of me permission to run off 2 sets of tubs on that day so that he could always have one set of tubs empty to dry. I consented to this and upon Colonel Chapman's arrival told him of it. He said I was authorized to do so. Distillery was turned over to me by F. B. Lawson and am satisfied that no material was put into the fermenting tubs after Lawson left and before the arrival of Colonel Chapman. When Colonel Chapman came he took entire charge of the distillery and it was subsequently run under his directions or that of his representative till he left. The material distilled from the set of tubs on November 2 was placed there under the directions of Mr. Lawson and produced in the test made under the direction of Mr. Chapman 569 gallons of spirits. The beer distilled from the second set of tubs on the 3rd of November produced 409 gallons of spirits, and that from the third set of tubs on the 4th day of November produced 345 gallons of spirits. The material in this last set of tubs was the first (230) weighed up by me after I took charge. Am satisfied that all, of the spirits distilled from these tubs after I took charge was conveyed to the cistern room and properly weighed, measured and barrelled there.

C. B. Stroop. Was working at D. C. Foster's distillery at and some time prior to November 1, 1905, as beer runner. Was there when Colonel Chapman arrived and took charge of the distillery and am satisfied that no more material was in the fermenting tubs when Colonel Chapman arrived than was permitted and authorized by law. Am also satisfied that the beer with which the run was made on the 2nd of November was interfered with in some way by some one on the previous night. The distillery had been in bad shape for some time prior to November 1st, so much so that Yates, the manager of the distillery, employed an expert distiller and yeast maker, Mr. Le-Val, of Columbia, S. C., to come to Williams and overhaul the distillery, making changes and install the use of a new kind of jug yeast. This yeast was used for the purpose of quickening fermentation and thereby increasing the yield from the beer

by extracting more of the alcoholic properties therefrom. Mr. Cowan the yeast maker in charge had been instructed by Mr. LeVal how to use the yeast in the process of fermentation and had just fully installed the new process when Mr. Landreth took charge as store-keeper.

W. M. COWAN. Was yeast maker at D. C. Foster's distillery at and for some time prior to November 1, 1905. When I took charge at the distillery it was in a bad condition, making a poor yield so that Mr. Yates, the manager, employed LeVal, an expert distiller and yeast maker to come to Williams and overhaul the distillery, putting us upon a new process of distillation with a new kind of jug yeast, and also to instruct me (231) how to use this new process and manufacture this yeast. I had just put the distillery upon this new process and the beer that was run out of the fermenting tubs and distilled on the 1st and 2nd of November was the first that had been fermented by me under this new process with fresh jug yeast furnished by Mr. LeVal which was much better and calculated to produce more spirits from a given quantity of material than the yeast that we had been theretofore using under the old system. Am satisfied that no more than 101 bushels of material was used in producing the beer which was used in making the test under the direction of Colonel Chapman on the second day of November, as it was impossible for more material to have been introduced into the fermenting tubs without my knowledge and the knowledge and consent of the store-keeper in charge as all the material was locked up in the meal room and when the store-keeper left, the distillery was locked up. There was no way to introduce material without his knowing it.

(232) T. A. CRAFT. Was miller in mill in which ground meal for the defendant which was located fifteen or twenty feet of the distillery first operated by Kennedy and then by D. C. Foster. Ground all the meal used in said distillery which was conveyed to the meal room in the latter building by way of elevator and conveyors. Impossible for any meal ground in mill to be abstracted from mill, the elevator or conveyors, or to go anywhere except into the meal room in the distillery. My duty was to grind each day a sufficient quantity of meal to furnish material for the day's mash, also when grinding was over to go to meal room and see storekeeper weigh up same, in order that I might keep a correct account of the amount ground each day, which I was required to turn into the office of the defendant company, at the end of each week, in order that it might charge same to the owner and operator of the distillery.

I am fully satisfied from the opportunity which I had, as above set forth, that no more material was weighed up each day and dropped into the mash tub, than that permitted by law. Distillery first run on 101 bushels capacity, then reduced to 21 bushels capacity, and remained there until Kennedy closed out in April, 1905. When started up by Foster it ran on 101 bushels capacity. My duty was to remain on the premises after finished grinding, practically all day. When I left I locked up the mill, carried the keys with me, and it was impossible for anyone to operate the mill without my knowledge. A considerable portion of the corn was hauled from Clemmons to the mill was subsequently hauled away and either sold to Sher-
(233) man and Dinkins, or used by Mr. Williams in feeding his stock and cattle. He had on an average of thirty-five head of horses and one year he made but very little corn on his place and ran out about the first of March and was compelled to feed from the corn bought and hauled from Clemmons for the remainder of the year until the new crop of corn came in. I cannot tell how much of this corn was sold to other parties or used by Mr. Williams.

The defendant had introduced in evidence deed from D. E. Kennedy and wife to D. C. Foster, dated May 9, 1905, duly registered in the office of the Register of Deeds of Yadkin County on May 2, 1905, conveying the distillery described in the deed from the Old Nick Williams Company to said D. E. Kennedy.

D. E. Kennedy & wife to D. C. Foster.

STATE OF NORTH CAROLINA, }
Yadkin County. }

This deed made this 9th day of May, 1905, by D. E. Kennedy and wife, M. R. Kennedy, of Yadkin County, and State of North Carolina, of the first part, to D. C. Foster of Yadkin County, and State of North Carolina of the second part, Witnesseth:

That in consideration of eight thousand, four hundred and fifty dollars, to them paid by D. C. Foster, the receipt of which is hereby acknowledged, have bargained and sold and by these presents do bargain, sell and convey to said D. C. Foster and his heirs all the right, title, interest and estate of the first part to a tract of land in Yadkin county, State of North Carolina, adjoining the lands of The Old Nick Williams Co., and others, bounded as follows, viz.:

Beginning at a stone ten feet South West of warehouse

and thence North two hundred and forty feet to a stone; thence East one hundred and five feet to a stone, thence South two hundred and five feet to the beginning, containing three quarters of an acre more or less.

To have and to hold the aforesaid tract of land and buildings and all privileges and appurtenances thereto belonging to the said D. C. Foster, heirs and assigns to have only use and behoof forever.

And the said D. E. Kennedy and wife, M. R. Kennedy, covenant that they are seized of said premises in fee, and have right to convey the same in fee simple; that the same are free and clear from all incumbrances and that they will warrant and defend said title to same against the claims of all persons whatsoever. In Testimony whereof the said D. E. Kennedy and wife, M. R. Kennedy, have hereunto set their hands and seals the day and year above written.

D. E. KENNEDY, [Seal]

M. R. KENNEDY, [Seal]

Attest:

J. A. LILLINGTON,

F. A. YATES.

STATE OF NORTH CAROLINA,
Yadkin County.

J. A. Lillington, Justice of the Peace, do hereby certify that D. E. Kennedy and M. R. Kennedy, his wife, personally appeared before me this day, and acknowledged the due execution of the within deed of conveyance and the said M. R. Kennedy being by me privately examined separate and apart from her said husband, touching her voluntary execution of the same doth state that she signed the same freely and voluntarily without fear or compulsion of her said husband or any other person and that she doth still voluntarily assent thereto.

Witness my hand and private seal. This 9th day of May, A. D., 1905.

J. A. LILLINGTON, J. P. [Seal]

STATE OF NORTH CAROLINA,
Yadkin County.

The foregoing certificate of J. A. Lillington, Justice of the Peace of Yadkin County is adjudged to be in due form and
(234) according to law.

Therefore let the same with this certificate be registered. This 19th day of May, A. D., 1905.

W. A. HALL,
Clerk Superior Court.

Filed May 19th, 1905, at 9 A. M.
Reg. May 20, 1905, at 9 A. M.

I, P. L. Wilhelm, Register of Deeds of Yadkin County, N. C., do hereby certify that the foregoing is a true copy of the deed executed by D. E. Kennedy & M. R. Kennedy to D. C. Foster, as appears on the record in my office. This Octo. 9, 1906.

[Seal] P. L. WILHELM, Reg. D.

Minute Book of the defendant company offered in evidence and Judge Bynum read therefrom the following resolution:

"At a special called meeting of the directors of the O. N. W. Co. held January 30, 1904, Messrs. Bowerman, Gallaudet and Stevenson were present. Mr. Stevenson reported that Mr. Williams was still sick in bed and unable to attend the meeting. On account of his sickness and for other reasons he stated that Mr. Williams and he both thought it best to carry out the plan that had been discussed of selling the distillery to D. E. Kennedy. On motion of Mr. Bowerman, the trade outlined was ordered made and the distillery was sold to D. E. Kennedy for the price of $10,000, and the President N. Glenn Williams, was authorized and directed to execute proper deeds of conveyance or bond for title, as the attorneys might determine, and to accept notes in payment."

(335) J. Will Jones (Recalled by Judge Bynum). On my direct examination I stated that the proposition made to me by Mr. Williams was on the occasion when he and I, were sleeping in his parlor. We slept in the parlor because Mr. Williams said his wife was ill and his house was crowded which made it necessary. I am positive this was on the 25th of June. There was a trained nurse there but I don't remember her name.

Mrs. B. C. Sharpe. Live in Greensboro. Received letter from Mr. Williams on 28th day of May, 1903, stating his wife was very ill, requesting that I come at once. Am teacher in Normal & Industrial College and know this is date I received letter because it is the date of closing our Commencement

in said college. I left Greensboro on the next day, the 29th, went to Winston, and from there to Williams with Miss Martin, a trained nurse. Remained at Williams two weeks while she was there. We both left at the end of that time together. Saw J. Will Jones at Mr. Williams' house while I was there and remembered that he and Mr. Williams slept in parlor one night because house was crowded and no other place for them to sleep. The maid and I made down a bed in the parlor for Mr. Jones and Mr. Williams slept upon the lounge. Am satisfied this was within two weeks after the 29th of May, 1903.

Col. BURGE: Am Special Revenue Agent. Been in service for thirty years. Went to Williams on the 24th of June and remained till the 25th. Met Mr. J. Will Jones there. He was there, having come on the 25th. Distinctly remember (236) that Mrs. Williams at that time was up and about the house and presided at the table. Jones and I stayed all night at Mr. Williams' and am sure he did not sleep in parlor. He appeared to be perfectly friendly with Mr. Williams and complained to me that he was afraid he was going to be removed from that territory and stated he was very much opposed to going. He made no complaint to me or said anything whatever about Mr. Williams having attempted to bribe him.

F. A. YATES. Live at Williams, Yadkin County. Been living there for five years. Married a Miss Williams relative of Glenn Williams. Have been employed by the defendant company, since it was organized. Have worked in the capacity of an outside man. Very little office work. Very little to do with rectifying. Was employed by company in winter and spring of 1904. D. E. Kennedy came to Williams December, 1903. Remained there ever since. He had entire charge of rectifyer as compounder. Know about the sale of distillery to Mr. Kennedy. Mr. Williams was sick in December and January, 1904, and was unable to look after his business. Stated that he would be bound to sell distillery,—that is, company would. Asked me to go and see Kennedy and have him come down to talk over the matter with a view of a sale. I did so. (Defendant here offers in evidence, fee simple deed from the Old Nick Williams Company to D. E. Kennedy dated February 1st, 1904, consideration $10,000.00, conveying distillery and premises of said company to said Kennedy, executed same day and registered in the office of Register of Deeds Yadkin County 26th day of April, 1905.)

The Old Nick Williams Co. to D. E. Kennedy.

STATE OF NORTH CAROLINA,
Yadkin County.

(237) This deed made this 1st day of Feb., 1904, by the Old Nick Williams Co., of Yadkin County, and State of North Carolina, of the first part, to D. E. Kennedy of Yadkin County, and State of N. C., of the second part, Witnesseth:

That the Old Nick Williams Company in consideration of ten thousand dollars, to them paid by D. E. Kennedy, the receipt of which is hereby acknowledged, has bargained and sold, and by these presents do bargain, sell and convey to said D. E. Kennedy and his heirs, all the right, title, interest and estate of the party of the first part to a tract of land in Yadkin County, State of N. C., adjoining the lands of The Old Nick Williams Co., and others, bounded as follows, viz.:

Beginning at a stone ten feet North West of warehouse and thence North two hundred and fifty-five feet to a stone, thence East one hundred and fifty-five feet to a stone, thence South two hundred and fifty-five feet to a stone, thence West one hundred and fifty-five feet to the beginning, containing three quarters of an acre more or less.

To have and to hold the aforesaid tract of land and buildings and all privileges and appurtenances thereto belonging to the said D. E. Kennedy and his heirs and assigns, to have only use and behoof forever.

And the said The Old Nick Williams Co., covenants that are seized of said premises in fee and have right to convey the same in fee simple, the said are free and clear from all incumbrances and that they will warrant and defend said title to the same against the claims of all persons whatsoever.

In testimony whereof, That said The Old Nick Williams Co., has hereunto set its hand and seal the day and year above written.

THE OLD NICK WILLIAMS CO., [Seal]

By N. GLENN WILLIAMS, President. [Seal]

Attest:

F. A. YATES,

T. WILLIAMS.

STATE OF NORTH CAROLINA,
Yadkin County.

I, W. A. Hall, Clerk of the Superior Court, do hereby certify that the execution of the foregoing instrument was this

day proven before me by the oath and examination of F. A. Yates the subscribing witness thereto.

Let the same with this certificate be registered. Witness my hand and official seal, this 26 day of April, A. D., 1900.

W. A. HALL,
Clerk Superior Court.

Filed April 26, 1905, at 2:15 P. M.
Reg. April 26, 1905, at 3 P. M.

NORTH CAROLINA, }
Yadkin County. }

I, P. L. Wilhelm, Reg. of Deeds of Yadkin County, do hereby certify that the foregoing is a true copy of the deed executed by The Old Nick Williams Co., by N. Glenn Williams, President to D. E. Kennedy, as appears upon record in my office.

This Octo. 9, 1906.
[Seal]

P. L. WILHELM,
Reg. Deeds.

(238) When this deed was made agreement was entered into between the company and Kennedy to the effect that it would advance him the means and material with which to operate the distillery and he was to give the company an option on all spirits distilled by him at the market price. The company was to keep the distillery in repair for one year. Kennedy gave his note for ten thousand dollars for purchase money, payable to the company and thereupon took charge and began to operate distillery. Company was also to advance funds with which to pay his labor and to furnish him wood etc., for all of which he was to be and was charged, and was to reimburse company either in cash or from proceeds of sale of spirits to be manufactured. Company was to take the slops from distillery at 15 cents a barrel. Bushel of meal will produce fifty gallons slop. He operated the distillery under this contract for about thirteen months. He employed me to look after the office work, keep his books,—not his distillery books,—his other books, and to keep the accounts between him and the company and other people, for which he paid me ten dollars per month. After running distillery for thirteen months he sold it to D. C. Foster for sixteen hundred dollars less, I think, than he paid for it. This sale was made in 1905, after the law was passed requiring all distilleries to close up at Williams on January 1st,

1906. Mr. Foster is a young man of means, being worth, to my knowledge, between six and eight thousand dollars. He was travelling for the company when trade was made and is still doing so. He executed power of attorney to me and I have (239) been looking after his business and managing distillery for him ever since. (Power of attorney offered in evidence from D. C. Foster to F. A. Yates, dated October 12th, 1905,) giving him full power and authority in his absence to manage and operate the said distillery.

The book now shown me is in the account book of D. E. Kennedy and contains a correct account of all amounts paid out by the company for Kennedy including material furnished, cash advanced for labor and everything else, also the amount of whiskey bought by the company from Kennedy, and the amount of slop, etc., and the prices paid for same. Mr. Williams raised very little corn during the year 1903, most of his land being planted in wheat. He kept regularly from twenty-eight to thirty-five head of horses and mules and was compelled to buy a great deal of corn during the year 1904 with which to feed his stock. He ran out of corn in February, 1904, and had to buy corn from then until the new crop was gathered. Do not know how much he used in this way for feeding, but several thousand bushels, some of which was hauled direct from Clemmons and some from the mill at the distillery. Kennedy now has in warehouse at Williams nearly five thousand gallons of spirits unsold. Remember the spirits referred to by the witness Minor which came there in July, 1903, when the rectifying house was seized by Deputy Collector Pinnix. It was purchased from R. D. Cartwright and hauled there by one of Gus Shore's teams, that is, Mr. Williams had contracted to purchase it.

(240) On account of the seizure of the rectifying house it was stored in a crib off the premises of said rectifying house, at suggestion of Mr. Pinnix.

Cross Examined.

I know J. B. Stevenson. Do not think he was ever Assistant Secretary of the company. When he went to Winston at meeting of stockholders that passed resolutions authorizing the sale of the distillery to Kennedy for ten thousand dollars, he was acting secretary, had a proxy to represent Mr. Williams. Mr. Stevenson worked in office attending correspondence. I am still in the employ of the company at a salary of $32.50 per month. Yes, I kept books for Mr. Kennedy. Did not buy the corn that went into the distillery. Company bought it first, ground it into meal and sold the meal to Kennedy.

Don't think the company received as much as a car load of corn per week. Purchased their corn through Slater Bros. Southern Malthing Company, Simpson and others, through Hansel Thomas of Winston. Do not know how much was purchased. Bought a considerable amount in car load lots. Also rye and malt in the same way. Don't know how much. Some of the corn and rye was sold in the neighborhood, can't tell how much. The company bought the corn in car load lots as it could get it cheaper that way. Think it must have resold to parties other than Kennedy five or six thousand bushels. Sold Mr. Williams pretty close to three thousand bushels. Company only had one team of mules. Rest belonged to Mr. Williams. He hired teams to the company. Kennedy's books will show the prices he paid for the corn or meal he purchased for the company. (241) Kennedy said he had no means with which to operate the distillery. All the spirits sold by Kennedy were purchased by the company. Kennedy lost money in running the distillery and now owes the company $3,760.92 for money and material advanced him while operating same, but he has five thousand gallons of whiskey in the warehouse in which he has a margin of forty or fifty cents a gallon, amounting to about twenty-five hundred dollars. Kennedy looked after his own hands and employed them. I had nothing to do with that. I said the company advanced him money to pay Johnson and other employes operating the distillery. Mr. Williams said he would have nothing to do with the distillery business on account of his physical condition, could not attend to it. Read me a letter he had written to Mr. W. A. Blaid of Winston sometime before the sale to Kennedy in which he told Blaid he would let the plant rot before he would attempt to run it in his then physical condition. Company still holds the note against Mr. Kennedy for the purchase money of the distillery. When Wennedy sold to Foster the company took the note for $8,450.00 which Foster gave Kennedy as collateral security for Kennedy's $10,000.00 note. The company shipped considerable stuff from Clemmons and some from Winston. Sometimes we hauled two or three loads a day, sometimes not any. Shipped chiefly in retail packages in boxes similar to boxes shown me.

A. G. Faulkner. Special United States Gauger, assigned to duty under Revenue Agent Chapman. At his direction I made an examination of D. E. Kennedy's distillery on 24th, (242) 25th, 27th and 28th of March, 1905, in company of D. C. Downing. Went there each of these days, took the temperature and gravity of the beer and made a general examination of the distillery. Found everything all right.

J. H. C. Norman. Am deputy revenue collector since August 10th, 1904, succeeded Mr. Pinnix. As such officer it became my duty to visit and examine the distillery of D. E. Kennedy and the rectifying house of the Old Nick Williams Company. Made these examinations about once a month. Made ordinary examination of books and premises of distillery. Found everything all right also visited and made usual examination of rectifying house in same way. Found everything all right and regular. There are nine whiskey distilleries within my territory, three at Williams and six at Shore. Four rectifying houses, one at Williams and three at Shore. All the rectifyers are retailers and there may be some brandy retailers. There are eighty-five brandy distillers, none of which are retailers that I know of.

Mr. Yates, Recalled. I know the names of the gentlemen who operate the three rectifying houses at Shore. They are Mr. Hartman, Mr. Steelman and Mr. Ervin Shore—three plants. I have seen these gentlemen upon the attendance of this court. About eight miles from Shore to Williams.

Defense rests—Government resumes.

W. F. James. Know D. C. Foster. Worked for me. All the property I know of his owning is a half interest in a farm that he paid $600.00 for and he told me he had a thousand (243) dollars in the bank. This was a year or two ago.

Mr. Hatch Recalled. Was subpœned here to bring my record,—railroad records, from Winston at the April term of this court. Carried them to the hotel. Saw Mr. Yates while I was carrying them up to Col. Williams' room. While the records were being unloaded from the dray Yates came out of the hotel and asked me what that was. I told him. He asked me what would become of an agent should his records mysteriously disappear, and he be unable to account for them.

Mr. Cotner. Recalled. Some of my railroad records were taken out of my office at Clemmons last spring,—last of April. Some one entered office through window. Took impression books,—freight and express mostly, got duplicate bills of lading. They got the records and papers that contained shipments of the O. N. W. Company and bills of lading that it had sent out. Saw Mr. Yates there a few days before this. He was looking over the book.

Cross examined. He and I were trying to trace some freight error,—some freight that had gone astray. We did

this nearly every time he came there. Books open to inspection of any shipper, when they asked me to see them. Railroad office had been broken into several years before this and some of the records destroyed. This was before the O. N. W. Company began shipping from that point.

Government closed.

(244) The books of the distiller introduced in evidence by the Government show that on an average of 2 8/10 gallons of spirits were produced from each bushel of material used during the time said distillery was operated by D. E. Kennedy, and that the spirits when tax paid and withdrawn from the warehouse of D. E. Kennedy were all sold to the Old Nick Williams Company as appears from the said books of D. E. Kennedy and also the rectifiers books of the Old Nick Williams Company.

It is agreed that the foregoing testimony or evidence is the evidence introduced upon the trial of the cause and is to be included in the first bill of exception and used as reference in other bills of exceptions.

A. E. HOLTON,
U. S. Attorney,
MOORE & ROLLINS,
W. P. BYNUM, JR.,
J. E. ALEXANDER,
THOMAS SETTLE,
BURWELL & CANSLER,
Attorneys for Deft. The Old Nick Williams Co.

(245) At the close of the evidence, all of which is set out above, and while the jury was still at the bar and in apt time, the defendant, the Old Nick Williams Company, prayed the court in writing to give to the jury the following special instruction:

"Upon all the evidence in this case, the court instructs the jury to find the defendant, the Old Nick Williams Company, not guilty of the charge contained in the first count in the bill."

The court refused to give this special instruction to the jury, but charged them in reference thereto as to the defendant, Old Nick Williams Company, as follows:

"We now come to consider the case with regard to the responsibility of a corporate body. A corporation, gentlemen, is not a natural body,—it is a mere creature of the law—what is called a legal entity, having its existence by virtue of the law, with its business and affairs controlled, directed, managed and carried on through its officers, its managers and agents, whoever they may be. A corporation cannot act of itself because it is not tangible,—it has no personality; necessarily if a corporation becomes liable, either civilly or criminally, it must become (246) so by reason of the act of its authorized agent, or agents.

Take, for instance, a railroad corporation. The corporation itself, cannot operate a train; the corporation itself cannot make a contract; the corporation itself cannot endanger the safety of a passenger; the corporation itself cannot deal wrongfully with its employees. But the corporation itself, by reason of its human instrumentalities called upon to manage, conduct and carry on its business, can be made responsible. The town ordinance, which forbids a train to run at a greater rate of speed than that named in its ordinance within its limits, could only be violated by reason of the fact that some agent of the railroad exceeded the speed. The railroad company contracting to transport a passenger safely from one point to another, could only be made responsible for the violation of such contract—for a failure to perform such contract—because some one of its agents in charge or in authority to control had violated the contract. So with this corporation.

Gentlemen, this corporation can only be made criminally responsible by virtue of the acts of its agents; and the law says it may be made criminally responsible if its agents, in carrying on its business, violate the criminal law.

"If, therefore, gentlemen, you are satisfied from the testimony, beyond this reasonable doubt, which I have called to your attention, that the Old Nick Williams Co., this corporation, acting through its president or its other various agents, violated the laws which I have called to your attention, then the company would be guilty. If that company and its corporate authority were used by any of its various agents in the conduct of the business which it had undertaken for the purpose of violating these laws, then the corporation is guilty. Not only is the corporation guilty, but the officer who carried within his breast, or the agent who carried within his breast, the intention to so use the corporation, would be guilty. Not only that, but others indicted for acting in concert, and joining in a common purpose with the view in the ultimate end of a violation of the criminal laws of the United States would be guilty. The company was authorized, as a corporation, to carry on the business

of a rectifier, and although the president had no knowledge of it, yet if other agents of the company used the name and the business rights of the company to defraud the Government of the United States, the company would still be guilty, although it may have been done without the knowledge and consent of its chief officer, because the other agents, the other directors, the other managers, would be equally competent to involve the company by their acts in the commission of a criminal offence." (247)

Whereupon the defendant, the Old Nick Williams Company, by its counsel did then and there, while the jury was still in the box and at bar, object and except to such refusal, and to the charge as given,

The said objection and exception being made and taken in the form of the following paper, which at the close of the charge of the court to the jury, was signed and filed by defendants' counsel:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA. FOURTH CIRCUIT, AT GREENSBORO.

United States
vs.
The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy.

Exceptions to Refusal to charge Defendants' Requests, etc.

The defendants, while the jury are still in the jury box and at bar, respectfully except to His Honor's refusal to charge each and every of their prayers for instructions, which were refused by him, and they further except to the modification of each and every of their special prayers for instructions which were modified by him; and they still further except to the giving of such instructions and to the giving of each of them so modified.

BURWELL & CANSLER,

BYNUM, SETTLE, ALEXANDER,

MOORE & ROLLINS,

For Defendants.

upon the grounds that in no view of the evidence, giving the plaintiff, the United States of America, the benefit of all of the same and of all reasonable inferences and deductions to be drawn therefrom, is the defendant guilty of the charge against it contained in the first count of the bill of indictment; and for that further, int nowhere appears in the evidence, nor can it be inferred or deduced from the same, that the defendant, the Old Nick Williams Company, being as charged in the bill of indictment a corporation, had or was capable of having, the wrongful and fraudulent intent denounced by the statute in such cases and charged against it in the first count of the bill of indictment.

And for that, still further, the defendant, the Old Nick Williams Company, being as charged in the bill of indictment and as shown by the evidence, a corporation, it cannot in law have or be charged with the fraudulent intent, alone or with
(248) others, to defraud the United States of the tax on spirits rectified by it as charged in the bill of indictment, and prayed that this bill of exceptions might be signed and sealed and it is signed and sealed accordingly.

BILL OF EXCEPTIONS No. 2.

At the close of the evidence, all of which is set out above, and here incorporated and made a part hereof, and while the jury was still at the bar and in apt time, the defendant, the Old Nick Williams Company, prayed the court in writing to give to them the following special instruction:

"There is no evidence in this case that the Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy did, as charged in the bill of indictment, engage in and carry on the business of rectifiers of distilled spirits, and therefore the jury will return a verdict of not guilty as to all of said defendants."

The court refused to give this instruction to the jury as requested, whereupon the defendant, the Old Nick Williams Company, by its counsel did then and there, while the jury was still at the bar, object and except to such refusal.
(249)

The said objection and exception being made and taken in the form of the following paper, which at the close of the charge of the court to the jury, was signed and filed by defendants' counsel:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA. FOURTH CIRCUIT, AT GREENSBORO.

United States
vs.
The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy.

Exceptions to Refusal to charge Defendants' Requests, etc.

The defendants, while the jury are still in the jury box at bar, respectfully except to His Honor's refusal to charge each and every of their special prayers for instructions, which were refused by him, and they further except to the modification of each and every of their special prayers for instructions which were modified by him; and they still further except to the giving of such instructions and to the giving of each of them so modified.

BURWELL & CANSLER,
BYNUM, SETTLE, ALEXANDER,
MOORE & ROLLINS,
For Defendants.

upon the ground that the evidence did not show nor could it be inferred or deducted from the same, that the Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy, did, as charged in the bill of indictment, engage in and carry on the business of rectifiers of distilled spirits. On the contrary, the evidence clearly shows, and it shows nothing else, that the Old Nick Williams Company, not with the defendants N. Glenn Williams and D. E. Kennedy, as alleged, but entirely alone, in its corporate name and for itself, without the other defendants, engaged in and carried on the business of rectifiers of distilled spirits, and prayed that this bill of exceptions might be signed and sealed, and it is signed and sealed accordingly.

BILL OF EXCEPTIONS No. 3

(250)

On the 2nd day of November, 1905, while the trial of the case was in progress, the same having been begun on the 31st day of October, 1905, while the defendants, N. Glenn Williams, and D. E. Kennedy, were present in court and constantly in attendance upon this trial, and in their absence and in the absence

so far as appeared in the evidence before the court of any officer or agent of the defendant, Old Nick Williams Company, except F. A. Yates, who was present when test was made, the United States Attorney, acting under directions from the proper officer of the government, sent one Chapman, a revenue agent, and several other persons, some of whom were shown and admitted to be expert distillers, to the distillery in the town of Williams, Yadkin County, North Carolina, being then operated under a license issued to one D. C. Foster and being the same formerly operated under a license issued to the defendant Kennedy, and the same conveyed by the defendant, Old Nick Williams Company, to the said Kennedy on the 1st day of February, 1903, and the same conveyed by the said Kennedy to the said Foster by deed dated on the 9th day of May, 1905, for the purpose of making a test of its whiskey producing capacity from a given quantity of grain or a given quantity of meal ground from grain; and said revenue agent and such other persons with him, while at said distillery making such inspection and tests, took the same into their possession and distilled the beer made from the meal then collected in two of the fermenting tubs in said distillery, for the purpose of determining the producing capacity of the said distillery. Afterwards the prosecution, to maintain and prove the issue raised by the bill of indictment and the plea of not guilty of the defendant, Old (251) Nick Williams Company, introduced the said W. H. Chapman said revenue agent, and the other persons with him in making said tests, over the objections of the Old Nick Williams Company, who testified that they had made said tests when so sent to said distillery, by distilling in said distillery the beer collected in two of the fermentors or tubs therein, which tests showed that four and one half gallons of spirits were produced by said distillery from each bushel of grain used therein, for the purpose of showing the producing capacity of said distillery, and the testimony was admitted by the court over the objection of defendant's counsel, as was stated at the time by the court in presence of the jury only for the purpose of proving the producing capacity of the distillery.

Whereupon counsel for the Old Nick Williams Company did then and there insist before the court that the said testimony should not be allowed, on the ground that the same was incompetent, irrelevant and immaterial as to it; and that still (252) further, in no event could said tests or evidence concerning the same be competent against the defendant, Old Nick Williams Company, in passing upon the question of the guilt or innocence of said company of the charge contained in the first count of the said bill of indictment, and the said defendant,

by its counsel, did then and there pray said court not to admit and allow the same, the said evidence to be submitted to the jury, but the court did then and there allow and admit the said testimony to be introduced, and stated to the jury at the time that the testimony was only competent to be considered by the jury as evidence of the producing capacity of the distillery.

(253) Whereupon counsel for the defendant, Old Nick Williams Company, did then and there propose its aforesaid objections to the ruling of the court, and prayed that this Bill of Exception might be signed and sealed, and it is signed and sealed accordingly.

BILL OF EXCEPTIONS No. 4.

On the second day of November, 1905, while the trial of the case was in progress, the same having been begun on the 31st day of October, 1905, while the defendant, N. Glenn Williams, and D. E. Kennedy were present in court and constantly in attendance upon this trial, and in their absence and in the absence so far as appeared in the evidence before the court of any officer or agent of the defendant, Old Nick Williams Company, except F. A. Yates, who was present when test was made, the United States Attorney, acting under directions of the proper officer of the government, sent one Chapman, a revenue agent, and several other persons, some of whom were shown and admitted to be expert distillers, to the distillery in the town of Williams, Yadkin County, North Carolina, being then operated under a license issued to one, D. C. Foster, and being (254) the same *formally* operated under a license issued to the defendant Kennedy, and the same conveyed by the defendant, Old Nick Williams Company, to the said Kennedy, on the 1st day of Feby., 1903, and the same conveyed by the said Kennedy to the said Foster, by deed dated on 9th day of May, 1905, for the purpose of making a test of its whiskey producing capacity from a given quantity of grain or a given quantity of meal ground from grain; and said revenue agent and such other persons with him while at said distillery, making such inspection and tests, took the same into their possession and distilled the beer made from the meal then collected in two of the fermenting tubs in the said distillery, Afterwards the prosecution, to maintain the issue raised by the bill of indictment and the plea of not guilty of the defendant Old Nick Williams Company, introduced the said W. H. Chapman, said revenue agent, and the other persons with him in making said tests, over the objections of the said Old Nick Williams Company, who testi-

fied that they had made said tests when so sent to said distillery, by distilling in said distillery the beer collected in two of the fermentors or tubs therein, which tests showed that more meal had been used in making said beer than was allowed under the law and the regulations controlling distilleries and that more whiskey was produced from said beer than could have been made therefrom had only the proper quantity of grain and meal (255) been used in its production; that the amount of grain or meal allowed by law and the surveyed capacity of the distillery was 101 bushels, whereas the tests made by them demonstrated that a much larger quantity of meal had been used, as they believed about thirty bushels more than was permitted by the law and the regulations, which evidence was admitted by the court for the purpose of showing the capacity of such distillery, as stated at the time to the jury.

Whereupon afterwards, and at the close of the evidence, all of which is set out in the record and incorporated into Bill of Exception Number One, and also incorporated into and made a part hereof, and while the jury was still in the box and at the bar, in apt time, the defendant prayed the court in writing, to give to them the following special instruction:

"98. The jury is instructed to consider the evidence of the test made at the distillery under the direction of Col. Chapman, during the trial of this case, only for the purpose of showing or tending to show the capacity of said distillery to produce distilled spirits from a given quantity of grain or material, as throwing light upon the question as to whether the defendants or either of them operated said distillery during the time referred to in the bill of indictment with intent to defraud the government. And the jury is instructed in passing upon the question not to consider the evidence of the government witnesses tending to show that more than the authorized quantity of meal was used in producing the beer from which the test was made, as that fact, if proved, could not have any bearing whatever upon any charge contained in the bill of indictment, as there is no evidence in this case tending to show that the defendants or either of them were responsible for the operation of the said distillery at or immediately before said tests were made."

The court refused to give this special instruction to the jury.

Whereupon the defendant, Old Nick Williams Company, by its counsel, did then and there, while the jury was in the box

(257) and at the bar, object and except to such refusal to charge as requested.

The said objection and exception being made and taken in the form of the following paper, which at the close of the charge of the court to the jury, was signed and filed by defendants' counsel:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA. FOURTH CIRCUIT. AT GREENSBORO.

United States
vs.
The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy.

Exceptions to Refusal to charge Defendants' Requests, etc.

The defendants, while the jury are still in the jury box at bar, respectfully except to His Honor's refusal to charge each and every of their special prayers for instructions, which were refused by him, and they further except to the modification of each and every of their special prayers for instructions which were modified by him; and they still further except to the giving of such instructions and to the giving of each of them so modified.

BURWELL & CANSLER,
BYNUM, SETTLE, ALEXANDER,
MOORE & ROLLINS,
For Defendants.

upon the ground that the fact testified to by the witnesses that in their opinion more than the authorized quantity of meal was used in producing the beer from which the test was made, could have no bearing whatever upon the charge contained in the first count in the bill of indictment against it, and upon the ground, further, that there is no evidence in this case tending to show that the defendant, Old Nick Williams Company, was responsible for the operation of said distillery at or immediately before the time when said tests were made; and upon the grounds, further, that in no event could such tests or evidence of the same, be competent, relevant, or material, upon the issue raised by the bill of indictment and the plea of not guilty,

so far as said issue relates to the charge against the defendant, contained in the first count in the bill of indictment; and still further upon the ground that in no view of the case could said tests or evidence concerning the same have been competent, relevant, or material upon the charge contained in the first count in said bill of indictment, unless the jury should find and be satisfied beyond a reasonable doubt from the evidence that the defendant Old Nick Williams Company, was the owner or interested in the operation of the said distillery at the time said tests were made; and upon the grounds still further, that upon the entire (258) in evidence in the case, it plainly appears, as ultimately found by the jury, that the defendant, Old Nick Williams Company did not own said distillery, or any interest in the same, and that it was not responsible for, or interested in, the operation or management thereof; and prayed that this bill of exceptions might be signed and sealed and it is signed and sealed accordingly.

BILL OF EXCEPTIONS No. 5.

On the 2nd day of November, 1905, while the trial of the case was in progress, the same having been begun on the 31st day of October, 1905, while the defendants, N. Glenn Williams, and D. E. Kennedy, were present in court and constantly in attendance upon this trial, and in their absence and in the absence so far as appeared in the evidence on the trial of any officer or any agent of the defendant, Old Nick Williams Company, except F. A. Yates, who was present when test was made, the United States Attorney, acting under the directions of the prope officer of the government, sent one Chapman, a revenue agent, and several other persons, some of whom were shown and admitted to be expert distillers, to the distillery in the town of Williams, Yadkin County, North Carolina, being then operated under a license issued to one D. C. Foster and being the same formerly operated under a license issued to the defendant Kennedy, and the same conveyed by the defendant, Old Nick (259) Williams Company, to the said Kennedy on the 1st day of February, 1903, and the same conveyed by the said Kennedy to the said Foster by deed dated on the 9th day of May, 1905, for the purpose of making a test of its whiskey producing capacity from a given quantity of grain or a given quantity of meal ground from grain; and the said revenue agent and such other persons with him, while at said distillery making such inspection and tests, took the same into their possession and distilled the beer made from the meal then collected in two of the fermenting tubs in said distillery. Afterwards the prosecution,

to maintain the issue raised by the bill of indictment and the plea of not guilty of the defendant, Old Nick Williams Company, introduced the said W. S. Chapman, the said revenue agent, and the other persons with him in making said tests, over the objection of the Old Nick Williams Company, who testified that they had made said tests when so sent to said distillery, by distilling in said distillery, the beer collected in two of the fermentors or tubs therein, which tests showed that more meal had been used in making said beer than was allowed under the law and regulations controlling distilleries, and that more whiskey was produced from said beer than could have been made therefrom had only the proper quantity of grain and meal been used in its production; that the amount of grain or meal allowed by law and the surveyed capacity of the distillery was 101 bushels, whereas, the tests made by them demonstrated that a much larger quantity of meal had been used, as they believed, about thirty bushels more than was permitted by the (260) law and the regulations, which evidence was admitted by the court for the purpose of showing the capacity of said distillery as stated by the court to the jury at the time.

Whereupon afterwards, and at the close of the evidence, all of which is set out in the record and incorporated into Bill of Exception Number One, and also incorporated into and made a part hereof, and while the jury was still in the box and at the bar, and in apt time, the defendant prayed the court in writing, to give to them the following special instruction:

"99. Unless the jury shall be satisfied beyond a reasonable doubt that the distillery which was used by Revenue Agent Chapman and others on the 2nd inst. for the purpose of testing its capacity, and which was then being run in the name of D. C. Foster, was not the property of the said Foster, but in reality the property of the defendants and operated by them, then the court charges the jury that they can only consider the evidence of said test for the purpose of showing the number of gallons of spirits which might be distilled from a given quantity of beer as contained in the two fermenting tubs as used in making said test, and they will not consider any evidence of the conditions and surroundings of said distillery at the time the test was made, which do not appear to have existed when the same was being operated in the name of D. E. Kennedy for the purpose of proving or tending to prove that said distillery was operated by the defendants for the purpose (261) of defrauding the government of the tax upon the spirits distilled thereat, as charged in the twelfth count of the bill of indictment. In other words, unless the said distillery was own-

ed and being operated by the defendants at the time the test was made, the evidence of the government's witnesses tending to show that more than 101 bushels of grain was used in making the mash in the fermenting tubs used in making said test, cannot be considered by the jury in passing upon the guilt or innocence of the defendants in this case. Neither would the acts and declarations of the distiller and others engaged in operating the said distillery at said time be competent evidence against the defendant in this case, unless the jury should be satisfied that the said distillery was then being operated by the defendants and not by the said Foster."

The court refused to give this special prayer to the jury.

(262) Whereupon the defendant, by its counsel, did then and there, while the jury was still in the box and at the bar, object and except to such refusal.

The said objection and exception being made and taken in the form of the following paper, which at the close of the charge of the court to the jury, was signed and filed by defendants' counsel:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA. FOURTH CIRCUIT, AT GREENSBORO.

United States
vs.
The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy.

Exceptions to Refusal to charge Defendants' Requests, etc.

The defendants, while the jury are still in the jury box and at bar, respectfully except to His Honor's refusal to charge each and every of their special prayers for instructions, which were refused by him, and they further except to the modification of each and every of their special prayers for instructions which were modified by him; and they still further except to the giving of such instructions and to the giving of each of them so modified.

BURWELL & CANSLER,
BYNUM, SETTLE, ALEXANDER,
MOORE & ROLLINS,
For Defendants.

upon the ground that in no view of the case was it competent, relevant, or material to prove the matters relating to said tests, so far as the defendant, Old Nick Williams Company, was concerned, unless it was shown to the jury beyond a reasonable doubt from the evidence alone that the said distillery was not the property of the said Foster, but in reality the property of the defendants and operated by them; and upon the ground further that it was not competent for the jury to consider the evidence of the said test as against the defendant, Old Nick Williams Company, for the purpose of showing the number of gallons of spirits which might be distilled from a given quantity of material or beer as contained in the two fermenting tubs used in making said tests, unless the jury should first find and be satisfied from the evidence alone beyond a reasonable doubt, that the defendant, Old Nick Williams Company, was the owner (263) of or interested in said distillery or the operation of the same; and further, upon the ground, that in no event was it competent, pertinent or material to consider the said tests or the evidence concerning the same, unless the jury should find that the conditions and surroundings at said distillery at the time said tests were made, were the same as existed and surrounded the same at the time the defendant, D. E. Kennedy, owned or operated the same; and, further, that the said tests and the evidence concerning the same was incompetent, irrelevant and immaterial, "unless the said distillery was owned and being operated by the defendants at the time the test was made;" and prayed that this bill of exceptions might be signed and sealed and it is signed and sealed accordingly.

BILL OF EXCEPTIONS No. 6.

On the 2nd day of November, 1905, while the trial of the case was in progress, the same having been begun on the 31st day of October, 1905, while the defendants, N. Glenn Williams, and D. E. Kennedy, were present in court and constantly in attendance upon this trial, and in their absence and in the absence so far as appeared on the trial, of any officer or any agent of the defendant, Old Nick Williams Company, except F. A. Yates, who was present when test was made, the United States Attorney, acting under the directions of the proper officer of the government, sent one Chapman, a revenue agent, and several other persons, some of whom were shown and admitted to be expert distillers, to the distillery in the town of Williams, Yadkin County, North Carolina, being then operat- (264) ed under a license to one D. C. Foster and being the same formerly operated under a license issued to the defendant

Kennedy, and the same conveyed by the defendant, Old Nick Williams Company, to the said Kennedy on the 1st day of February, 1903, and the same conveyed *to* the said Kennedy *by* the said Foster by deed dated on the 9th day of May, 1905, for the purpose of making a test of its whiskey producing capacity from a given quantity of grain or a given quantity of meal ground from grain; and the said revenue agent and such other persons with him, while at said distillery making such inspection and tests, took the same into their possession and distilled the beer made from the meal then collected in two of the fermenting tubs in said distillery. Afterwards the prosecution, to maintain the issue raised by the bill of indictment and the plea of not guilty of the defendant, Old Nick Williams Company, introduced the said W. S. Chapman, the said revenue agent, and the other persons with him in making said tests, over the objections of the said Old Nick Williams Company, who testified that they had made said tests when so sent to said distillery, by distilling in said distillery the beer collected in two of the fermentors or tubs therein, which tests showed that more meal had been used in making said beer than was allowed under the law and regulations controlling distilleries, and that more whiskey was produced from said beer than would have been made therefrom, had only the proper (265) quantity of grain and meal been used in its production; that the amount of grain or meal allowed by law, and the surveyed capacity of the distillery was 101 bushels, whereas, the test made by them demonstrated that a much larger quantity of meal had been used, as they believed, about thirty bushels, more than was permitted by the law the *the* regulations, which evidence was admitted by the court for the purpose of showing the capacity of said distillery and so stated to the jury.

Whereupon afterwards, at the close of the evidence, all of which is set out in the record and incorporated in Bill of Exceptions Number One, and also incorporated into and made a part hereof, and while the jury was still in the box and at the bar, and in apt time, the defendant prayed the court in writing, to give to them the following instruction:

"100. But if the jury shall be satisfied that the said distillery was in reality the property of the defendants and being operated by them in the name of the said Foster, then the court charges the jury that Revenue Agent Chapman was not as a matter of law, in the absence of the defendants or without their consent, authorized to take possession of the said distillery for the purpose of actually operating the same to test its capacity in order that evidence of said test might be used upon the

trial of this or any other indictment against these defendants, and the jury should not consider the evidence of the government's witnesses with reference to the result of said test, or even the fact that the test was made, in passing upon the guilt or innocence of the defendants in this case.

(266) The court refused to give this instruction to the jury as requested.

Whereupon the defendant, Old Nick Williams Company, by its counsel, did then and there, while the jury was still in the box and at the bar, and in apt time, object and except to such refusal and to the charge as given.

The said objection and exception being made and taken in the form of the following paper, which at the close of the charge of the court to the jury, was signed and filed by defendants' counsel:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA. FOURTH CIRCUIT, AT GREENSBORO.

United States
vs.
The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy.

Exceptions to Refusal to charge Defendants' Requests, etc.

The defendants, while the jury are still in the jury box at bar, respectfully except to His Honor's refusal to charge each and every of their special prayers for instructions, which were refused by him, and they further except to the modification of each and every of their special prayers for instructions which were modified by him; and they still further except to the giving of such instructions and to the giving of each of them so modified.

BURWELL & CANSLER,
BYNUM, SETTLE, ALEXANDER,
MOORE & ROLLINS,
For Defendants.

upon the ground, that even should the jury be satisfied from the evidence that the distillery was in reality the property of the defendants, and being operated by them in the name of

(267) the said Foster, in the absence of the defendants or without their consent, the revenue agent, Chapman, was not authorized to take possession of said distillery for the purpose of actually operating the same during the trial of this case and while the defendant were answering at the bar of the court to the charges contained in the bill of indictment, to test its capacity in order that evidence of said test might be used upon the trial against the said defendant; and, further, upon the ground that under these circumstances the jury should not have been permitted to consider the evidence of the government's witnesses with reference to the said tests, or even the fact that the tests were made, in passing upon the guilt or innocence of the defendants in this case; and prayed that this bill of exceptions might be signed and it is signed and sealed accordingly.

BILL OF EXCEPTIONS No. 7.

On the second day of November, 1905, while the trial of the case was in progress, the same having been begun on the 31st day of October, 1905, while the defendants, N. Glenn Williams, and D. E. Kennedy were present in court and constantly in attendance upon this trial, and in their absence and in the absence so far as appeared on the trial of any officer or agent of the defendant, Old Nick Williams Company, except F. A. Yates, who was present when test was made, the United States Attorney, acting under directions of the proper officer of the government, sent one Chapman, a revenue agent, and several other persons, some of whom were shown and admitted to be expert distillers, to the distillery in the town of Williams, Yadkin County, North Carolina, being then operated under a license issued to one, D. C. Foster, and being (268) the same formerly operated under a license issued to the defendant Kennedy, and the same conveyed by the defendant, Old Nick Williams Company, to the said Kennedy, on the 1st day of Feby., 1903, and the same conveyed *to* the said Kennedy *by* the said Foster, by a deed dated on 9th day of May, 1905, for the purpose of making a test of its whiskey producing capacity from a given quantity of grain or a given quantity of meal ground from grain; and the said revenue agent and such other persons with him while at said distillery, making such inspection and tests, took the same into their possession and distilled the beer made from the meal then collected in two of the fermenting tubs in the said distillery. Afterwards the prosecution, to maintain the issue raised by the bill of indictment and the plea of not guilty of the defendant Old Nick Williams Com-

pany, introduced the said W. S. Chapman, the said revenue agent, and the other persons with him in making the said tests, over the objections of the said Old Nick Williams Company, who testified that they had made said tests when so sent to said distillery, by distilling in said distillery the beer collected in two of the fermentors or tubs therein, which tests showed that more meal had been used in making said beer than was allowed under the law and regulations controlling distilleries and that more whiskey was produced from said beer than could have been made therefrom had only the proper quantity of grain and meal (269) been used in its production; that the amount of grain or meal allowed by law and the surveyed capacity of the distillery was 101 bushels, whereas the tests made by them demonstrated that a much larger quantity of meal had been used, as they believed about thirty bushels more than was permitted by the law and the regulations, which evidence was admitted by the court for the purpose of showing the capacity of said distillery, and so stated by the court at the time to the jury.

Whereupon, afterwards, at the close of the evidence, all of which is set out in the record, and incorporated into Bill of Exceptions No. 1, and also incorporated into and made a part hereof, and while the jury was still in the box and at the bar, and in apt time, the defendant prayed the court in writing to give to them the following instruction:

"101. The court instructs the jury as a matter of law, that these defendants, or either of them, cannot be held responsible for the acts, conduct and declarations of those in charge of the operation of the distillery being run in the name of D. C. Foster at and before the test was made by Revenue Agent Chapman on the 2nd inst., as it is not denied that at and prior to said time the defendants Williams and Kennedy were absent in attendance upon this court, and there is no evidence in this case that the persons so in charge of said distillery were the agents of the defendants or either of them, or authorized by them to do or say the things testified to by the government's witnesses. Therefore the court charges the jury in passing upon the guilt or innocence of these defendants, not to consider the evidence of the acts, conduct and declarations of the persons so in charge of said distillery at and before said test was made." (270)

The court refused to give this special instruction to the jury as requested.

Whereupon the defendant, Old Nick Williams Company, by its counsel did then and there and while the jury was still in the box and at the bar, object and except to such refusal,

The said objection and exception being taken at the close of the charge of the court to the jury in the form of a paper signed and filed by defendants counsel as follows:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA. FOURTH CIRCUIT, AT GREENSBORO.

United States
vs.
The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy.

Exceptions to Refusal to charge Defendants' Requests, etc.

The defendants, while the jury are still in the jury box and at bar, respectfully except to His Honor's refusal to charge each and every of their special prayers for instructions, which were refused by him, and they further except to the modification of each and every of their special prayers for instructions which were modified by him; and they still further except to the giving of such instructions and to the giving of each of them so modified.

BURWELL & CANSLER,
BYNUM, SETTLE, ALEXANDER,
MOORE & ROLLINS,
For Defendants.

and to the charge upon this point as given, upon the ground that (271) under the circumstances as shown in the evidence as above detailed, the defendant, Old Nick Williams Company, could not be held responsible for the acts, conduct and declarations of those in charge of the operation of the distillery being run in the name of B. C. Foster at and before the test was made by Revenue Agent Chapman on the 2nd inst.; and upon the ground, further, that there is no evidence in this case that the persons in charge of said distillery at the time said tests were made, were the agents of the defendants, Old Nick Williams Company, or authorized by the Old Nick Williams Company to do or say the things testified to by the government's witnesses; and upon the ground, still further, that it was the duty of the court to charge the jury that in passing upon the guilt or innocence of the defendant, Old Nick Williams Company, not to consider the evidence of the acts, conduct and dec-

larations of the persons in charge of the said distillery in the absence of the defendant or of anyone authorized to represent it at and before said tests were made; and prayed that this bill of exceptions might be signed and sealed, and it is signed and sealed accordingly.

BILL OF EXCEPTIONS No. 8.

(272)

On the second day of November, 1905, while the trial of the case was in progress, the same having been begun on the 31st day of October, 1905, while the defendants, N. Glenn Williams, and D. E. Kennedy were present in court and constantly in attendance upon this trial, and in their absence and in the absence so far as appeared on the trial of any officer or agent of the defendant, Old Nick Williams Company, except F. A. Yates, who was present when test was made, the United States Attorney, acting under directions of the proper officer of the government, sent one Chapman, a revenue agent, and several other persons, some of whom were shown and admitted to be expert distillers, to the distillery in the town of Williams, Yadkin County, North Carolina, being then operated under a license issued to one, D. C. Foster, and being the same operated under a license issued to the defendant Kennedy, and the same conveyed by the defendant, Old Nick Williams Company, to the said Kennedy, on the 1st day of Feby., 1903, and the same conveyed *to* the said Kennedy *by* the said Foster, by a deed dated on 9th day of May, 1905, for the purpose of making a test of the whiskey producing capacity from a given quantity of grain or a given quantity of meal ground from grain; and the said revenue agent and such other persons with him while at said distillery, making such inspection and tests, took the same into their possession and distilled the beer made from the meal then collected in two of the fer-
(273) menting tubs in said distillery. Afterwards the prosecution, to maintain the issue raised by the bill of indictment and the plea of not guilty of the defendant Old Nick Williams Company, introduced the said W. H. Chapman, the said revenue agent, and the other persons with him in making the said tests, over the objection of the said Old Nick Williams Company, who testified that they had made said tests when so sent to said distillery, by distilling in the said distillery the beer collected in two of the fermentors or tubs therein, which tests showed that more meal had been used in making said beer than was allowed under the law and regulations controlling distilleries and that more whiskey was produced from said beer than could have been made therefrom had only the proper quantity of grain and meal

been used in its production; that the amount of grain or meal allowed by law and the surveyed capacity of the distillery was 101 bushels, whereas the tests made by them demonstrated that a much larger quantity of meal had been used, as they believed about thirty bushels more than was permitted by the law and the regulations, which evidence was admitted by the court for the purpose of showing the capacity of said distillery, and so stated by the court at the time to the jury.

Whereupon, afterwards, at the close of the evidence, all of which is set out in the record, and incorporated into Bill of Exceptions No. 1, and also incorporated into and made a part hereof, and while the jury was still in the box and at the bar, and in apt time, the defendant prayed the court in writing to give to them the following instruction:

"102. The evidence of the government's witnesses as to the result of the test made by them at the distillery on the 2nd inst. and of the acts, conduct and declarations of those engaged in operating said distillery at the time, if competent at all, can only be considered by the jury in passing upon the offense charged in the twelfth count in the bill of indictment, and the jury will not in any event consider it for any other purpose."

(275) The court refused to give this instruction to the jury as requested.

Whereupon the defendant, Old Nick Williams Company, by its counsel, did then and there, while the jury was still in the box and at the bar, and object and except to such refusal to so charge and to the charge as given.

The said objection and exception being made and taken in the form of the following paper, which at the close of the charge of the court to the jury, was signed and filed by defendants' counsel:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA. FOURTH CIRCUIT, AT GREENSBORO.

United States
vs.
The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy.

Exceptions to Refusal to charge Defendants' Requests, etc.

The defendants, while the jury are still in the jury box and at bar, respectfully except to His Honor's refusal to charge each

and every of their special prayers for instructions, which were refused by him, and they further except to the modification of each and every of their special prayers for instructions which were modified by him; and they still further except to the giving of such instructions and to the giving of each of them so modified.

BURWELL & CANSLER,
BYNUM, SETTLE, ALEXANDER,
MOORE & ROLLINS,
For Defendants.

upon the ground that the evidence of the government's witnesses as to the result of the test made by them at the distillery on the 2nd inst., and of the acts, conduct and declaration of those engaged in operating said distillery at the time, if competent at all, should only be considered by the jury in passing upon the offense charged in the twelfth count of the bill of indictment; and further that such evidence could have no bearing whatever upon, and was wholly incompetent, irrelevant and immaterial as to the charge contained in the first count in the bill of indictment, and prayed that this bill of exceptions might be signed and it is signed and sealed accordingly.

BILL OF EXCEPTIONS No. 9.

At the close of the evidence, all of which is set out in the record and incorporated into, embraced in and made a part of Bill of Exceptions No. 1, and all of which is now incorporated into this bill of exceptions, and hereby made a part hereof, and while the jury was still in the box and at the bar, and in apt time, the defendant, Old Nick Williams Company, prayed the court in writing to give to them the following special instructions:

(276)

"106. In the first, ninth, tenth and twelfth counts in the bill of indictment, the defendants are charged with doing the acts therein alleged with the intent to defraud the United States of its tax. This intent is a necessary ingredient and element of the crimes charged in the said counts. It is this intent to defraud the United States of its tax which makes the guilt of the defendants, and in the absence of such intent there is no violation of the Act of Congress prohibiting the doing of the things which are charged in the said counts. This intent is the essence and essential necessary element in the crime charged in the said counts and denounced by law."

The court refused to give this special instruction to the jury as requested.

Whereupon the defendant, Old Nick Williams Company, by its counsel did then and there and while the jury was still in the box and at the bar, object and except to such refusal,

The said objection and exception being made and taken in the form of the following paper, which at the close of the charge of the court to the jury, was signed and filed by defendants' counsel:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA. FOURTH CIRCUIT, AT GREENSBORO.

United States
vs.
The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy.

Exceptions to Refusal to charge Defendants' Requests, etc.

The defendants, while the jury are still in the jury box and at bar, respectfully except to His Honor's refusal to charge each and every of their special prayers for instructions, which were refused by him, and they further except to the modification of each and every of their special prayers for instructions which were modified by him; and they still further except to the giving of such instructions and to the giving of each of them so modified.

BURWELL & CANSLER,

BYNUM, SETTLE, ALEXANDER,

MOORE & ROLLINS,

For Defendants.

upon the ground that the fraudulent intent of the defendant in doing the act charged against it is necessary element and ingredient in the crime charged in the first count of the bill of indictment; that, in the absence of such intent there could be no violation of the Act of Congress prohibiting the doing of the things charged in said count in the bill of indictment, and prayed that this bill of exceptions be signed, sealed and it is signed and sealed accordingly.

BILL OF EXCEPTIONS No. 10.

At the close of the evidence, all of which is set out in the record and incorporated into, embraced in and made a part of Bill of Exceptions No. 1, and all of which is now incorporated (277) into this bill of exceptions and hereby made a part hereof, and while the jury was still in the box and at the bar, and in apt time, the defendant, Old Nick Williams Company, prayed the court in writing to give them the following special instruction:

"107. The jury cannot, therefore, presume that the defendants or any of them are guilty upon the first, ninth, tenth and twelfth counts, even should they find that they did the acts charged in said counts. It is incumbent upon the government in this case to go further and to satisfy you fully and beyond reasonable doubt that they did those acts charged in the said counts with the wrongful intent to injure and defraud the United States of its tax as charged in the said counts."

The court refused to give this special instruction to the jury as requested, whereupon, the defendant, by its counsel, did then and there, while the jury was still in the box and at the bar, object and except to such refusal.

The said objection and exception being made and taken in the form of the following paper, which at the close of the charge of the court to the jury, was signed and filed by defendants' counsel:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA. FOURTH CIRCUIT, AT GREENSBORO.

United States
vs.
The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy.

Exceptions to Refusal to charge Defendants' Requests, etc.

The defendants, while the jury are still in the jury box and at bar, respectfully except to His Honor's refusal to charge each and every of their special prayers for instructions, which were refused by him, and they further except to the modification of each and every of their special prayers for instructions which were modified by him; and they still further except to the giv-

ing of such instructions and to the giving of each of them so modified.

BURWELL & CANSLER,
BYNUM, SETTLE, ALEXANDER,
MOORE & ROLLINS,
For Defendants.

upon the ground that in this case as to the charge contained in the first count in the bill of indictment, it was not only the duty of the government to prove and satisfy the jury beyond a reasonable doubt, that the defendant did the acts charged in said counts, but that it did such acts with the wrongful and fraudulent intent to defraud the United States of its tax as charged in said count; and prayed that this bill of exceptions might be signed and sealed and it is signed and sealed accordingly.

BILL OF EXCEPTIONS No. II.

(278)

At the close of the evidence, all of which is set out in the record and incorporated into, embraced in and made a part of Bill of Exceptions No. 1, and all of which is now incorporated into this bill of exceptions, and hereby made a part hereof, and while the jury was still in the box and at the bar, and in apt time, the defendant, Old Nick Williams Company, prayed the court in writing to give to them the following special instructions:

"108. There is no presumption of the guilt of the defendants arising from the fact that they did the acts charged against them in the bill of indictment. If the jury shall find that the defendants did do such acts charged in the first, ninth, tenth and twelfth counts and in the way and manner charged therein, they will not presume from the doing of such acts that the defendants are guilty, for it is not the doing of such acts that constitutes guilt, but it is the doing of the acts charged with the wrongful intent to defraud the United States of its tax; and unless such intent exists and the jury should be satisfied beyond all reasonable doubt from the evidence alone that such intent existed, they cannot convict the defendants or either of them upon said counts."

The court refused to give this instruction to the jury as requested, whereupon the defendant, the Old Nick Williams Company, by its counsel did then and there, while the jury was still in the box and at the bar, object and except to such refusal.

The said objection and exception being made and taken in the form of the following paper, which at the close of the charge of the court to the jury, was signed and filed by defendants' counsel:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA. FOURTH CIRCUIT, AT GREENSBORO.

United States
vs.
The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy.

Exceptions to Refusal to charge Defendants' Requests, etc.

The defendants, while the jury are still in the jury box and at bar, respectfully except to His Honor's refusal to charge each and every of their special prayers for instructions, which were refused by him, and they further except to the modification of each and every of their special prayers for instructions which were modified by him; and they still further except to the giving of such instructions and to the giving of each of them so modified.

BURWELL & CANSLER,
BYNUM, SETTLE, ALEXANDER,
MOORE & ROLLINS,
For Defendants.

upon the ground that there is no presumption of the guilt of the defendant arising from the fact that it did the acts charged (279) in the bill of indictment, for if the jury should find, that the defendant did such acts, they would not be authorized to presume from the doing of such acts alone that the defendant was guilty, for it is the doing of the acts charged with the wrongful intent to defraud the United States of its tax that constitutes the guilt of the defendant, if there was guilt at all; and prayed that this bill of exceptions might be sealed and it was signed and sealed accordingly.

BILL OF EXCEPTIONS No. 12.

At the close of the evidence, all of which is set out in the record and incorporated into, embraced in and made a part of Bill of Exceptions No. 1, and all of which is now incorporated into this bill of exceptions, and hereby made a part hereof, and

while the jury was still in the box and at the bar, and in apt time, the defendant, Old Nick Williams Company, prayed the court in writing to give to them the following special instructions:

"109. If the acts charged in the first, ninth, tenth and twelfth counts were committed by the defendants for any other purpose or with any other intent than to defraud the United States of its tax, then the defendants are not guilty as charged in the said counts, and the jury will return a verdict of not guilty on the said counts."

(280)

The court refused to give this special instruction to the jury as requested, whereupon, the defendant, Old Nick Williams Company, by its counsel, did then and there, while the jury was still in the box and at the bar, object and except to such refusal.

The said objection and exception being made and taken in the form of the following paper, which at the close of the charge of the court to the jury, was signed and filed by defendants' counsel:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

FOURTH CIRCUIT, AT GREENSBORO.

United States
vs.
The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy.

Exceptions to refusal to charge defendants' requests, etc.

The defendants, while the jury are still in the jury box, and at the bar, respectfully except to his Honor's refusal to charge each and every of their special prayers for instructions, which were refused by him, and they further except to the modification of each and every of their special prayers for instructions, which were modified by him; and they still further except to the giving of such instructions and to the giving of each of them so modified.

BURWELL & CANSLER,
BYNUM, SETTLE, ALEXANDER,
MOORE & ROLLINS,
For Defendants.

upon the ground that the defendant could not be guilty of the (281) crime charged in the first count in the bill of indictment in the absence of any intent to defraud the United States of its tax, as charged in the said count; and prayed that this bill of exceptions might be signed and sealed, and it is signed and sealed accordingly.

BILL OF EXCEPTIONS No. 13.

At the close of the evidence, all of which is set out in the record and incorporated into, embraced in and made a part of Bill of Exceptions No. 1, and all of which is now incorporated into this bill of exceptions, and hereby made a part hereof, and while the jury was still in the box and at the bar, and in apt time, the defendant, Old Nick Williams Company, prayed the court in writing to give to them the following special instruction:

"110. The first count in the bill of indictment charges the defendants, The Old Nick Williams Company, a corporation, N. Glenn Williams, and D. E. Kennedy, with having power and authority to engage in and carry on the business of a rectifier of distilled spirits and that they (282) did, being then and there engaged in and carrying on the business of a rectifier of distilled spirits, engage in and carry on the same with intent to defraud the United States of the tax upon the spirits rectified by them. The burden is upon the government to show all of the material elements of the crimes charged against the defendants, and the government must show this to the satisfaction of the jury and beyond a reasonable doubt. It must show, first, that they did engage in and carry on the business of rectifiers of distilled spirits with power and authority derived from the government to do so. Second, it must so satisfy the jury that they so engaged in and carried on the business of rectifiers of distilled spirits with the wrongful intent to defraud the United States of the tax upon the spirits rectified by them. It is not the mere engaging in or carrying on the business of a rectifier which makes the defendants guilty. It is the wrongful intent to defraud the United States of its tax which makes the guilt, and if the jury should find from the evidence and beyond a reasonable doubt that the defendants did have power and authority to engage in and carry on the business of a rectifier of distilled spirits and that they did engage in and carry on such business, but they should fail to be satisfied from the evidence beyond a reasonable doubt that the defendants had such wrongful and fraudulent intent in so engaging in and carrying on the said business, the jury would return a verdict of not guilty against them on said count.

(283)

The court refused to give this instruction to the jury as requested, whereupon the defendant, Old Nick Williams Company, by its counsel, did then and there, while the jury was still in the box, and at the bar, object and except to such refusal.

The said objection and exception being made and taken in the form of the following paper, which at the close of the charge of the court to the jury, was signed and filed by defendants' counsel:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA. FOURTH CIRCUIT, AT GREENSBORO.

United States
vs.
The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy.

Exceptions to Refusal to charge Defendants' Requests, etc.

The defendants, while the jury are still in the jury box and at bar, respectfully except to His Honor's refusal to charge each and every of their special prayers for instructions, which were refused by him, and they further except to the modification of each and every of their special prayers for instructions which were modified by him; and they still further except to the giving of such instructions and to the giving of each of them so modified.

BURWELL & CANSLER,
BYNUM, SETTLE, ALEXANDER,
MOORE & ROLLINS,
For Defendants.

upon the ground that the burden devolved upon the government of showing to the jury from the evidence alone and beyond a reasonable doubt that the defendant, Old Nick Williams Company, did engage in and carry on the business of rectifying of (284) distilled spirits, and that it did, while engaged in and carrying on such business, engage in and carry on the same with the intent to defraud the United States of the tax upon the spirits rectified by it. It was not the mere engaging in or carrying on business of rectifiers, which made the defendant guilty, but it was the wrongful intent to defraud the United States of

its tax which makes the guilt; and, although the jury should find from the evidence and beyond a reasonable doubt that the defendant, Old Nick Williams Company, had the power and authority to engage in and carry on the business of rectifier of distilled spirits, and that it did engage in and carry on such business, if they should fail to be satisfied beyond a reasonable doubt that the defendants had such wrongful and fraudulent intent in engaging in and carrying on the business, a verdict of not guilty should be returned by them upon said count; and prayed that this bill of exceptions be signed and sealed, and it is signed and sealed accordingly.

BILL OF EXCEPTIONS No. 14.

At the close of the evidence, all of which is set out in the record and incorporated into, embraced in and made a part of Bill of Exceptions No. 1, and all of which is now incorporated (285) into this bill of exceptions and hereby made a part hereof, and while the jury was still in the box and at the bar, and in apt time, the defendant, Old Nick Williams Company, prayed the court in writing to give them the following special instruction:

"121. 'Proof beyond a reasonable doubt is such as will produce an abiding conviction in the mind to a moral certainty that the fact exists that is claimed to exist so that you feel certain it exists. A balance of proof is not sufficient. A juror in a criminal case ought not to condemn unless the evidence excludes from his mind all reasonable doubt; unless he be so convinced, no matter what the class of the evidence of the defendant's guilt, that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to his own dearest personal interests'."

The court refused to give this instruction to the jury as requested and instead thereof, charged the jury as follows: "The term (reasonable doubt) that is used in law and described to be a reasonable doubt, has been given by various courts, and various law writers, a definition. The most terse definition that I have heard is where the judge said that 'a reasonable doubt is a doubt such as a juror might be able to give a reason for.' But that, gentlemen, does not probably express the idea, because a juror might have a doubt and a doubt which, in his mind, was sufficient, and yet he might not be able to explain to another person the basis of his doubt sufficiently to convey to the mind of the other person that there was reason for it. It is a reason which exists in the mind of the juror,

based upon practical experience, based upon circumstances, based upon the surroundings, based upon sound judgment. Probably the best definition of a reasonable doubt can be given by an illustration. The facts in the case, that is, such of the testi-
(286) mony as tends to establish facts, as delivered by the witnesses, is the guide to lead the minds of the jury to a conclusion. If, by the evidence, the way is blazed so distinctly that the mind travels readily to the terminus and there reaches guilt, it is the duty of the jury to return a verdict of guilty. And, although the way may become indistinct at a point, yet, if, after examination, the direct way is eventually discovered from the testimony and the mind travels along and reaches the end and finds there located the guilt of the accused there is no reasonable doubt. But, if, viewing all the evidence, both that of the prosecution and the defense, the index to the way becomes indistinct and uncertain at any material point, so that the mind halts and hesitates and is unable, when examining the marks of the blaze along the way, to determine which direction shall be taken,—which is the proper direction to follow,—such a situation would, in the opinion of the court, raise a doubt, based upon reason, sufficient to warrant acquittal—such would be a reasonable doubt."

(287)

Whereupon the defendant, Old Nick Williams Company, by its counsel, did then and there, while the jury was still in the box and at the bar, object and except to such refusal and to the charge as given to the jury.

The said objection and exception being made and taken in the form of the following paper, which at the close of the charge of the court to the jury, was signed and filed by defendants' counsel:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA. FOURTH CIRCUIT, AT GREENSBORO.

United States
vs.
The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy.

Exceptions to Refusal to charge Defendants' Requests, etc.

The defendants, while the jury are still in the jury box and at bar, respectfully except to His Honor's refusal to charge each and every of their special prayers for instructions, which were

refused by him, and they further except to the modification of each and every of their special prayers for instructions which were modified by him; and they still further except to the giving of such instructions and to the giving of each of them so modified.

BURWELL & CANSLER,
BYNUM, SETTLE, ALEXANDER,
MOORE & ROLLINS,
For Defendants.

upon the ground that the definition stated in the special prayer is the proper one, and should have been given to the jury; that is, "A reasonable doubt is such as will produce an abiding conviction in the mind to a moral certainty that the facts exists that is claimed to exist, so that you feel certain it exists;" and (288) upon the ground, further, that the defendant was entitled to have the court tell the jury as prayed in this special prayer, "A balance of proof is not sufficient;" and further, the defendant was entitled to have the court charge the jury that "A juror in a criminal case ought not to condemn unless the evidence excludes from his mind all reasonable doubt; unless he be convinced by the evidence, no matter what the class of the evidence of the defendant's guilt, that a prudent man would feel safe to act upon the conviction in matters of the greatest concern and importance to his own dearest personal interests;" and upon the ground further, that the charge, as given and the definition contained therein, is not sufficient in law and not in compliance with, or in response to, the request made by the defendant, and what it was entitled to have given to the jury; and prayed that this bill of exception might be signed and sealed, and it is signed and sealed accordingly.

BILL OF EXCEPTIONS No. 15.

It was shown in evidence, and admitted upon the trial, that at the times referred to in the bill of indictment charging the defendant, Old Nick Williams Company, with the commission of crimes against the laws of the United States, that the defendant, Old Nick Williams Company, was engaged in and carrying on the business of a retail liquor dealer, and that it (289) had paid the government the special tax imposed by law upon said business. It was also shown in evidence, and admitted upon the trial that the defendant, Old Nick Williams Company, was a licensed rectifier of distilled spirits, as well as a licenced wholesaler of the same.

At the close of the evidence, all of which is set out in the record, and incorporated into and made a part of Bill of Exceptions No. 1 and hereby incorporated into and made a part of this bill of exceptions, and while the jury was still in the box, and at the bar, and in apt time, the defendant prayed the court in writing, to give to them the following special instruction:

"123. The evidence in this case discloses the fact that at the time referred to in the bill of indictment the defendant, The Old Nick Williams Company, was engaged in and carrying on the business of a retail liquor dealer and had paid the government the special tax imposed by law upon said business. This (290) being true, the court charges the jury that The Old Nick Williams Company as such retail liquor dealer, had the legal right to purchase wholesale packages of spirits duly stamped and place the same in its retail establishment without making entries of such purchase upon the wholesale or rectifying books which the government required the said company to keep in connection with its business as a wholesale liquor dealer or rectifier of distilled spirits. The Old Nick Williams Company also had the right as such retail liquor dealer to draw off from such wholesale packages so purchased by it and placed in its retail establishment retail packages or packages of less than five gallons and to sell the same without entering such transactions upon any books required by law to be kept by it as a wholesale liquor dealer or rectifier of distilled spirits. And unless the jury shall be satisfied beyond a reasonable doubt from the evidence that the defendants did not draw off the retail packages of spirits which were shipped by The Old Nick Williams Company from wholesale packages purchased by it as a retail liquor dealer, but in fact drew off the said retail packages or some of them from its rectified or wholesale packages which had been purchased by it for or charged by it to retail or obtained them from non-tax paid packages otherwise acquired, then the jury could not convict the defendants of any of the offenses charged in the bill of indictment, unless the government has satisfied you beyond a reasonable doubt of their guilt upon evidence other than that of the mere sales of retail packages of spirits in quantities in excess of the amounts which appear upon the wholesale or rectifying books of The Old Nick Williams Company to have been disposed of by it."

The court refused to give this instruction to the jury as requested, but charged the jury as follows:

"Gentlemen of the jury. The court inadvertently overlooked a matter which is involved in this case, and which is insisted upon by the District Attorney, as an evidence of guilt, and which, on the other hand, the defendants' counsel insist is not a requirement, and that is, the regulation issued by the Commissioner of Internal Revenue in regard to the duty of a wholesale liquor dealer to keep a record when he joins his busi-
(291) ness with that of a retail dealer.

"The court will charge you that such a regulation is a reasonable regulation. The commissioner has a right to make such a regulation, but the violation of the regulation does not constitute a criminal offence, because the commissioner has no right, even with the approval of the Secretary of the Treasury, to make a regulation, the violation of which would constitute a crime, but he has a right to make the regulation with a view to affording a check upon such persons as engage in both the wholesale and retail business of liquor dealers together; that is, where a person being a wholesale liquor dealer takes out license to carry on the business of a retail dealer, or vice versa, and carries it on in the same place, on the same premises, then it is reasonable for the commissioner to say that that wholesale dealer, being at the same time a retail dealer, should enter upon his books all packages brought in, and transferred to his retail business. The court charges you that the failure of a wholesale dealer, who is also a retail dealer, to keep this record may be considered by the jury as evidence tending to support the theory of the Government, if in fact, you find that he failed to keep it. That is about all there is of that. It was argued by counsel for the defendants that it did not constitute a crime, and the court is in accord with that view. But if the Government has shown that there went into the wholesale establishment quantities of spirits bought from other places but not entered upon the retail books of the company that may be considered by the jury as a circumstance in connection with other circumstances tending to show unlawful purpose.
(292)

Whereupon the defendant, Old Nick Williams Company, by its counsel did then, there and while the jury was still in the box and at the bar, and in apt time, object and except to such refusal to give said instruction and to the instruction given by the court instead thereof.

The said objection and exception being made and taken in the form of the following paper, which at the close of the charge of the court to the jury, was signed and filed by defendants' counsel:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA. FOURTH CIRCUIT, AT GREENSBORO.

United States
vs.
The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy.

Exceptions to Refusal to charge Defendants' Requests, etc.

The defendants, while the jury are still in the jury box and at bar, respectfully except to His Honor's refusal to charge each and every of their special prayers for instructions, which were refused by him, and they further except to the modification of each and every of their special prayers for instructions which were modified by him; and they still further except to the giving of such instructions and to the giving of each of them so modified.

BURWELL & CANSLER,
BYNUM, SETTLE, ALEXANDER,
MOORE & ROLLINS,
For Defendants.

(293)
upon the ground that upon the facts shown and admitted, the defendant, Old Nick Williams Company, as such retail liquor dealer, had the legal right to purchase wholesale packages of spirits duly stamped and place the same in its retail establishment without making entries of such purchase upon the wholesale, or rectifying books which the government required of the said company to keep in connection with its business as a wholesale liquor dealer or rectifier of distilled spirits; and further, upon the ground that said defendant company had the right as such retail liquor dealer to draw off from such wholesale packages so purchased by it and placed in its retail establishment, retail packages or packages of less than five gallons, and to sell the same without entering the said transactions upon any books required by law to be kept by it as a wholesale liquor dealer or rectifier of distilled spirits; and further upon the ground that the defendant was entitled to have the court tell the jury, that (294) unless the jury shall be satisfied beyond a reasonable doubt from the evidence that the defendant, Old Nick Williams Company did not draw off the retail packages of spirits which were shipped by the Old Nick Williams Company from whole-

sale packages purchased by it as a retail dealer, but in fact drew off the said retail packages, or some of them from its rectified or wholesale packages, which had been purchased by it for or charged by it to retail, or obtained them from non-tax paid packages otherwise acquired, that then the jury could not convict the defendants of the offense charged in the first count of the bill of indictment, unless the government had satisfied the jury beyond a reasonable doubt of the guilt of the defendants upon evidence other than that of the mere sale of retail packages of spirits in quantities in excess of the amounts which appeared upon the wholesale or rectifying books of the said company to have been disposed of by it; and upon the further ground that said regulation by the Commissioner of Internal Revenue above quoted was not evidence competent to be submitted to the jury for any purpose; and for that the jury should not have been permitted to consider the same as tending to support the theory of the government or for any other purpose; and prayed that this bill of exception might be signed and sealed, and it is signed and sealed accordingly.

BILL OF EXCEPTIONS No. 16.

(295)

It was shown in evidence and admitted upon trial that at the time referred to in the bill of indictment charging the defendant, Old Nick Williams Company with the commission of crime against the law of the United States, that the defendant, Old Nick Williams Company, was engaged in and carrying on the business of a retail liquor dealer and that it had paid the government the special tax imposed by law upon said business. It was also shown in evidence, and admitted upon the trial that the defendant Old Nick Williams Company, was a licenced rectifier of distilled spirits, as well as a licenced wholesaler of the same. It was also shown in evidence by the prosecution, and testified to by various witnesses that the Old Nick Williams Company, had from time to time sold large quantities of retail packages of spirits in excess of the amounts which it had theretofore caused to be charged off to retail, upon its wholesale or rectifying books required by the government to be kept by it.

At the close of the evidence, all of which is set out in the record, and incorporated herein in Bill of Exception No. 1, and hereby incorporated in this bill of exception and made a part hereof, and while the jury was in the box, and still at the bar, and in apt time, the defendant, Old Nick Williams Company, prayed the court in writing to give them the following special instruction:

"124. In other words, before the government can convict the defendants or either of them of any of the offenses charged in the bill of indictment upon the evidence that The Old Nick Williams Company had from time to time sold large quantities of retail packages of spirits in excess of the amounts which (296) it had theretofore caused to be charged off to retail and upon its wholesale or rectifying books required by the government to be kept by it, the jury must be satisfied beyond a reasonable doubt that the retail packages so sold were in fact not liquors purchased by the said company in its capacity as a retail liquor dealer, in duly stamped wholesale packages, but that the said retail packages so sold and shipped had been drawn off from its wholesale or rectified packages which had not been charged off to retail, or were packages otherwise acquired contrary to law and upon which the tax had not been paid."

The court refused to give this special instruction to the jury whereupon the defendant, Old Nick Williams Company, by its counsel, did then and there, while the jury was in the box, and still at the bar, and in apt time, object and except to the court's refusal to give the same as requested.

The said objection and exception being made and taken in the form of the following paper, which at the close of the charge of the court to the jury, was signed and filed by defendants' counsel:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.
FOURTH CIRCUIT, AT GREENSBORO.

United States
vs.
The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy.

Exceptions to refusal to charge defendants' requests, etc.

The defendants, while the jury are still in the jury box, and at the bar, respectfully except to his Honor's refusal to charge each and every of their special prayers for instructions, which were refused by him, and they further except to the modification of each and every of their special prayers for instructions, which were modified by him; and they still further except to the giving of such instructions and to the giving of each of them so modified.

BURWELL & CANSLER,
BYNUM, SETTLE, ALEXANDER,
MOORE & ROLLINS,
For Defendants.

(297)
upon the ground that upon the evidence and particularly upon the evidence last above stated the jury should have been instructed by the court that they must be satisfied beyond a reasonable doubt that the retail packages so sold were in fact not liquors purchased by the defendant company in its capacity as a retail liquor dealer in duly stamped wholesale packages, but that the said retail packages so sold and shipped had been drawn off from its wholesale or rectifying packages which had not been charged off to retail, or were packages otherwise acquired contrary to law and upon which the tax had not been paid.
and prayed that this bill of exceptions be signed and sealed, and it is signed and sealed accordingly.

BILL OF EXCEPTIONS No. 17.

(298)
It was shown in the evidence and admitted upon the trial that at the time referred to in the bill of indictment charging the defendant, Old Nick Williams Company with the commission of crime against the law of the United States, that the defendant, Old Nick Williams Company, was engaged in carrying on the business of a retail liquor dealer and that it had paid the government the special tax imposed by law upon said business. It was also shown in evidence, and admitted upon the trial that the defendant Old Nick Williams Company, was a licenced rectifier of distilled spirits, as well as a licenced wholesaler of the same. It was also shown in evidence by the prosecution, and testified to by various witnesses that the Old Nick Williams Company, had from time to time sold large quantities of retail packages of spirits in excess of the amount which it had theretofore caused to be charged off to retail, upon its wholesale or rectifying books required by the government to be kept by it.

At the close of the evidence, all of which is set out in the record, and incorporated in Bill of Exceptions No. 1 herein, and now hereby incorporated into this bill of exceptions and made a part hereof, and while the jury was still in the box, and at the bar, and in apt time, the defendant, Old Nick Williams (299) Company, prayed the court in writing to give to them the following special instruction:

"125. The court has permitted the prosecution to introduce evidence tending to show amounts of spirits sold and shipped by the defendant, The Old Nick Williams Company. This evidence by itself is not sufficient to justify the jury in returning a verdict against the defendants or any of them. If the jury should find from this evidence that the defendant, The

Old Nick Williams Company, sold or disposed of more distilled and rectified spiritous liquors than the evidence shows it bought or otherwise obtained, this will not justify you in returning a verdict of guilty."

The court refused to give this special instruction to the jury, whereupon the defendant, by its counsel, did then and there, and while the jury was still in the box, and at the bar, object and except to the court's refusal to give the same as requested.

The said objection and exception being made and taken in the form of the following paper, which at the close of the charge of the court to the jury, was signed and filed by defendants' counsel:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA. FOURTH CIRCUIT, AT GREENSBORO.

United States
vs.
The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy.

Exceptions to Refusal to charge Defendants' Requests, etc.

The defendants, while the jury are still in the jury box and at bar, respectfully except to His Honor's refusal to charge each and every of their special prayers for instructions, which were refused by him, and they further except to the modification of each and every of their special prayers for instructions which were modified by him; and they still further except to the giving of such instructions and to the giving of each of them so modified.

BURWELL & CANSLER,
BYNUM, SETTLE, ALEXANDER,
MOORE & ROLLINS,
For Defendants.

upon the ground that this evidence by itself is not sufficient to justify the jury in returning a verdict against the defendant, the Old Nick Williams Company; and upon the further ground

that if the jury should find from the evidence that the defendant, Old Nick Williams Company, sold or disposed of more distilled and rectified spirituous liquors than the evidence showed it bought or otherwise obtained, still the jury would not be justified in returning a verdict of guilty as against it; and prayed that this bill of exceptions might be signed and sealed, and it is signed and sealed accordingly.

BILL OF EXCEPTIONS No. 18.

(300)

It was shown in the evidence and admitted upon the trial that at the time referred to in the bill of indictment charging the defendant, Old Nick Williams Company with the commission of crime against the law of the United States, that the defendant, Old Nick Williams Company, was engaged in and carrying on the business of a retail liquor dealer and that it had paid the government the special tax imposed by law upon said business. It was also shown in evidence, and admitted upon the trial that the defendant Old Nick Williams Company, was a licenced rectifier of distilled spirits, as well as a licenced wholesaler of the same. It was shown in evidence by the prosecution, and testified to by various witnesses that the Old Nick Williams Company, had from time to time sold large quantities of retail packages of spirits in excess of the amount which it had theretofore caused to be charged off to a retail, upon its wholesale or rectifying books required by the government to be kept by it.

At the close of the evidence, all of which is set out in the record and incorporated into and made a part of Bill of Exceptions No. 1 herein, and now and hereby incorporated into and made a part of this bill of exceptions and while the jury was still in the box and at the bar, and in apt time, the defendant, Old Nick Williams Company, prayed the court in writing to give them the following special instruction:

"127. The defendants are not required to show how, where, from whom or under what circumstances they obtained the spirits sold by them, and the government must show you, if it becomes material in this case, to your satisfaction beyond a rea-
(301) sonable doubt, that they obtained them in violation of the law."

The court refused to give this special instruction to the jury, whereupon the defendant, Old Nick Williams Company, by its counsel, did then and there, and while the jury was still in the box and at the bar, object and except to the court's refusal to give the same as requested.

The said objection and exception being made and taken in the form of the following paper, which at the close of the charge of the court to the jury, was signed and filed by defendants' counsel:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA. FOURTH CIRCUIT, AT GREENSBORO.

United States
vs.
The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy.

Exceptions to Refusal to charge Defendants' Requests, etc.

The defendants, while the jury are still in the jury box and at bar, respectfully except to His Honor's refusal to charge each and every of their special prayers for instructions, which were refused by him, and they further except to the modification of each and every of their special prayers for instructions which were modified by him; and they still further except to the giving of such instructions and to the giving of each of them so modified.

BURWELL & CANSLER,
BYNUM, SETTLE, ALEXANDER,
MOORE & ROLLINS,
For Defendants.

(302)

upon the ground that the defendant was not required to show how, where, from whom or under what circumstances it obtained the spirit sold by it, but it was the duty of the government to show to the satisfaction of the jury and beyond a reasonable doubt, that it obtained the same in violation of law; and prayed that this bill of exception might be signed and sealed, and it is signed and sealed accordingly.

BILL OF EXCEPTIONS No. 19.

(303)

It was shown in the evidence and admitted upon the trial that at the time referred to in the bill of indictment charging the defendant, Old Nick Williams Company with the commission of crime against the law of the United States, that the defendant, Old Nick Williams Company, was engaged in and carrying on the business of a retail liquor dealer and that it had paid the government the special tax imposed by law upon said business. It was also shown in evidence, and admitted upon the trial that

the defendant Old Nick Williams Company, was a licenced rectifier of distilled spirits, as well as a licenced wholesaler of the same. It was also shown in evidence by the prosecution, and testified to by various witnesses that the Old Nick Williams Company, had from time to time sold large quantities of retail packages of spirits in excess of the amounts which it had theretofore caused to be charged off to retail and upon its wholesale or rectifying books required by the government to be kept by it.

At the close of the evidence, all of which is set out in the record and incorporated in Bill of Exceptions No. 1 herein, and hereby incorporated into and made a part of this bill of exceptions and while the jury was still in the box and at the bar, and in apt time, the defendant prayed the court in writing to give to them the following special instruction:

"128. The defendants can wait in this case until the government has shown guilt. They are not guilty of a violation of the law simply because they sold more spirituous liquors than the evidence showed they distilled & bought, Kennedy being an authorized distiller, & the company being a rectifier, wholesaler and retailer of the same; nor are they called upon or required to explain how they became possessed of such spirituous liquors."

(304) The court refused to give this special instruction to the jury, whereupon, the defendant, Old Nick Williams Company, by its counsel, did then and there, and while the jury was still in the box, and at the bar, object and except to the court's refusal to give the same as requested.

The said objection and exception being made and taken in the form of the following paper, which at the close of the charge of the court to the jury, was signed and filed by defendants' counsel:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.
FOURTH CIRCUIT, AT GREENSBORO.

United States
vs.
The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy.

Exceptions to refusal to charge defendants' requests, etc.

The defendants, while the jury are still in the jury box, and at the bar, respectfully except to his Honor's refusal to

charge each and every of their special prayers for instructions, which were refused by him, and they further except to the modification of each and every of their special prayers for instructions, which were modified by him; and they still further except to the giving of such instructions and to the giving of each of them so modified.

BURWELL & CANSLER,
BYNUM, SETTLE, ALEXANDER,
MOORE & ROLLINS,
For Defendants.

(305)
upon the ground that the defendant, Old Nick Williams Company, was not guilty of a violation of the law with which it was charged, simply because it sold more spirituous liquors than the evidence showed it had bought, it being admitted by the prosecution that said defendant was an authorized and licenced rectifier, wholesaler and retailer of spirituous liquors, and further upon the ground that it was not called upon or required by law to explain how it became possessed of such spirituous liquors; and prayed that this bill of exceptions might be signed and sealed, and it is signed and sealed accordingly.

BILL OF EXCEPTIONS No. 20.

It was shown in the evidence and admitted upon the trial that at the time referred to in the bill of indictment charging the defendant, Old Nick Williams Company, with the commission of crime against the laws of the United States that the defendant Old Nick Williams Company, was engaged in carrying on the business of a retail liquor dealer and that it had paid the government the special tax imposed by law upon said business. It was also shown in evidence, and admitted upon the trial that the defendant, Old Nick Williams Company, was a licenced rectifier of distilled spirits, as well as a licenced wholesaler of (306) the same. It was shown in evidence by the prosecution, and testified to by various witnesses that the Old Nick Williams Company, had from time to time sold large quantities of retail packages of spirits in excess of the amounts which it had theretofore caused to be charged off to retail and upon its wholesale or rectifying books required by the government to be kept by it.

At the close of the evidence, all of which is set out in the record and incorporated in Bill of Exceptions No. 1 herein, and hereby incorporated into and made a part of this bill of exceptions and while the jury was still in the box and at the bar, and in apt time, the defendant prayed the court in writing to give the following special instruction to the jury:

"132. The fact, if true, that they, the defendants, did sell distilled spirits in a large quantity, does not put any burden upon them to explain or in any way account for their possession thereof."

The court refused to give this special instruction to the jury, whereupon, the defendant, Old Nick Williams Company, by its counsel, did then and there, and while the jury was still in the box, and at the bar, object and except to the court's refusal to give the same as requested.

The said objection and exception being made and taken in the form of the following paper, which at the close of the charge of the court to the jury, was signed and filed by defendants' counsel:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA. FOURTH CIRCUIT, AT GREENSBORO.

United States
vs.
The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy.

Exceptions to Refusal to charge Defendants' Requests, etc.

The defendants, while the jury are still in the jury box and at bar, respectfully except to His Honor's refusal to charge each and every of their special prayers for instructions, which were refused by him, and they further except to the modification of each and every of their special prayers for instructions which were modified by him; and they still further except to the giving of such instructions and to the giving of each of them so modified.

BURWELL & CANSLER,
BYNUM, SETTLE, ALEXANDER,
MOORE & ROLLINS,
For Defendants.

upon the ground that the fact, if true, that the defendant, did sell distilled spirits in a large quantity does not put any burden upon it to explain or in any account for their possession; and prayed that this bill of exceptions might be signed and sealed and it is signed and sealed accordingly.

BILL OF EXCEPTIONS No. 21.

(307) 21st Exception. Upon the trial, the Government introduced as a witness one, Cotner, who testified that he was an agent of the Southern Railway Company at its depot at Clemmonsville in the State of North Carolina, and that he had received from the defendant, Old Nick Williams Company, for shipment as such agent at Clemmonsville, a package of whiskey, which was labeled and marked "canned goods," that it was not marked or labelled whiskey, but only "canned goods" and that he shipped the same so marked, to the consignee whose name was marked upon the box. The defendant, the Old Nick Williams Company, requested of the court at the close of the evidence and while the jury was yet in the box and at the bar of the court, in apt time, and in writing, as follows: "Evidence of other transactions than those charged in the various counts of the bill of indictment, upon which the defendants are now being tried, can only be considered by the jury in so far as such evidence may tend to show the motive and intent with which the defendants did the acts charged in the bill of indictment, if they should find that they did such acts at all. Unless such evidence of other acts done by the defendants tend to throw light upon and aid the jury in determining the intent and purpose of the defendants in doing the acts charged against them, if you find they did do such acts at all, you must not give any weight to or consider such evidence of, other acts at all. Although the jury may believe that the defendants are guilty of other offenses and violations of the law than those charged against them and that such other transactions about which the witnesses have been permitted to testify, constitute such offen-
(308) ses, the jury cannot convict the defendants upon this bill of indictment on the same, and the jury should therefore not confound the defendants acts and doings which appeared in the evidence, detailed as to other transactions than those charged in the bill of indictment with those acts charged in the bill; for though the jury may believe the defendants guilty of violations of the law other than those charged in the bill of indictment, they will not be justified in finding them guilty in this case for such violations; and the jury is instructed to put out of consideration all the evidence of other transactions and doings of the defendants or any of them, no matter how wrongfully and unlawful the same may appear to the jury to be unless such transactions and doings tend to show the wrongful intent of the defendants in doing the acts charged in the bill of indictment."

The court refused to give this special prayer of the defendant to the jury whereupon the defendant Old Nick Williams

Company, by its counsel, did then and there while the jury was still at the bar object and except to such refusal of the court upon the ground—

The said objection and exception being made and taken in the form of the following paper, which at the close of the charge of the court to the jury, was signed and filed by defendants' counsel:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA. FOURTH CIRCUIT, AT GREENSBORO.

United States
vs.
The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy.

Exceptions to Refusal to charge Defendants' Requests, etc.

The defendants, while the jury are still in the jury box and at bar, respectfully except to His Honor's refusal to charge each and every of their special prayers for instructions, which were refused by him, and they further except to the modification of each and every of their special prayers for instructions which were modified by him; and they still further except to the giving of such instructions and to the giving of each of them so modified.

BURWELL & CANSLER,
BYNUM, SETTLE, ALEXANDER,
MOORE & ROLLINS,
For Defendants.

(309) that the evidence of the transaction detailed above, being one not charged in the bill of indictment against it, could not be considered by the jury unless the jury should find that it did in some way tend to throw light upon and aid the jury in determining the intent and purpose of the defendant, Old Nick Williams Co. in doing the act charged against it in the first count of the bill of indictment, and upon the ground further that it was the duty of the jury not to confound this act of the defendant even if they found that it committed the act with those acts charged in the bill of indictment against it, unless they should find that the said act in some way tended to throw light upon the act charged against the defendant in the bill of indictment, and prayed that this bill of exceptions might be signed and sealed and it is signed and sealed accordingly.

BILL OF EXCEPTIONS No. 22.

(310) The prosecution introduced one, Cotner, and other witnesses to testify that the defendant, Old Nick Williams Company, had, as retail liquor dealers, sold and shipped out, from its place of business at Williams, a large number of packages of whiskey at retail, and that the same had been shipped by said company from a point on the Southern Railway known as Clemmonsville, to various parties and persons in the States of North Carolina, South Carolina, Georgia and Virginia and many other States. The prosecution also introduced witnesses to testify that more whiskey had been sold by retail by the defendant company than appeared to have been charged off to the defendant's retail department from its wholesale department. It was not shown in evidence, nor was it contended by the defendant, Old Nick Williams Company, that all the whiskey which it had sold in its retail department did appear upon the books of the wholesale department, to have been charged off to the retail department, by the wholesale department. The defendant insisted upon the trial, and argued to the court, that the law did not require it, as a wholesale liquor dealer, to make or keep such a record of the packages of distilled spirits purchased by it for the purpose of being used and which were used by it in its business as a retail dealer, as was kept by it as a wholesale dealer, but that as such retail dealer it had the right common to all retail liquor dealers to purchase wholesale packages, which were duly stamped in such numbers and amounts (311) as it might see fit from licenced wholesale, liquor dealers or distillers, without making any record whatever of said transaction, or reporting the same to the Collector or other government officials; that it also had the right as such retail liquor dealer, to purchase retail packages or packages under five gallons from a retail and wholesale liquor dealer in such quantities as it might desire, or to purchase, retail packages in quantities not exceeding twenty gallons from any person, though not a licenced wholesale or retail liquor dealer, without making any record of any such transaction or reporting the same to said collector or other government official.

The Government called the attention of the court to the "Regulations and Instructions issued by the Commissioner of Internal Revenue on April 15, 1901, and published in Revisal No. 7 of such Regulations and Instructions on page 190, which instruction reads as follows:

"When a party carries on the business of wholesale and retail liquor dealer on the same premises he should take credit on this account, of the spirits disposed of at retail, which he

has entered as received, by setting aside packages from which to draw for retail only, and entering them as disposed of to himself as retail dealer.

At the close of the evidence, all of which is set out in the record, and incorporated herein in Bill of Exceptions No. 1, and hereby incorporated in this bill of exception and made a part hereof, and while the jury was still in the box, and at the bar, and in apt time, the defendant, Old Nick Williams Com-
(312) pany, prayed the court in writing to give to them the following special instruction:

"172. According to the undisputed evidence in this case, The Old Nick Williams Company, at the time mentioned in the bill of indictment, was by permission of the government, engaged in carrying on the business of a wholesale liquor dealer, the business of a rectifier of distilled spirits and the business of a retail liquor dealer, and had paid the special taxes required by the government to be paid for the privilege of carrying on each of said businesses. Under these circumstances it became the duty of The Old Nick Williams Company, when it purchased a package of distilled spirits in its capacity as a wholesale liquor dealer or a rectifier, which was to be used by it in its wholesale or rectifying business, to enter said transaction upon its wholesale or rectifying books prescribed by the Commissioner of Internal Revenue for that purpose and to also enter upon said books such other information as the said commissioner required, including the fact of the sale of such package, when sold, to whom sold and also to make due report of said transaction to the Collector of the District upon forms provided by said Commissioner of Internal Revenue. But the law did not require the Old Nick Williams Company as a retail liquor dealer to make or keep such record of packages of distilled spirits purchased by it for the purpose of being used and which were used by it, in its business as a retail liquor dealer, and as such retail liquor dealer it had the right, common to all retail liquor dealers, to purchase wholesale packages which were duly stamped in such numbers and amounts as it might see fit, from licensed wholesale liquor dealers or distillers, without making
any record whatever of said transaction or reporting the same
(313) to the Collector or other government official. It also had the right, as such retail liquor dealer, to purchase retail packages or packages under five gallons, from a retail and wholesale liquor dealer, in such quantities as it might desire, or to purchase retail packages in quantities not exceeding 20 gallons, from any person though not a licensed wholesale or retail liquor dealer, without making any record of any such transaction

or reporting the same to said Collector or other government official. This being the law, the court charges you that although you should be satisfied from the evidence that The Old Nick Williams Company did sell quantities of spirits in retail packages greatly in excess of the amounts shown by its wholesale or rectifying books to have been charged off to its retail business, yet the fact that it did sell said quantities of liquor in retail packages in excess of the amount so shown to have been charged off to the retail business, is not sufficient evidence to warrant the jury in finding beyond a reasonable doubt that the liquor so sold was sold by the defendants or either of them in violation of law, or that they or either of them, are guilty of the offenses charged in the several counts in the bill of indictment, because the liquor thus sold may have been purchased from persons other than those shown by the wholesale or rectifying books of The Old Nick Williams Company for (314) use in its business as a retail liquor dealer."

The court refused to give this special instruction and instead thereof charged the jury as follows:

"Gentlemen of the jury. The court inadvertently overlooked a matter which is involved in this case, and which is insisted upon by the District Attorney, as an evidence of guilt, and which, on the other hand, the defendants' counsel insist is not a requirement, and that is, the regulation issued by the Commissioner of Internal Revenue in regard to the duty of a wholesale liquor dealer to keep a record when he joins his business with that of a retail dealer.

"The court will charge you that such a regulation is a reasonable regulation. The commissioner has a right to make such a regulation, but the violation of the regulation does not constitute a criminal offence, because the commissioner has no right, even with the approval of the Secretary of the Treasury, to make a regulation, the violation of which would constitute a crime, but he has a right to make the regulation with a view to affording a check upon such persons as engage in both the wholesale and retail business of liquor dealers together; that is, where a person being a wholesale liquor dealer takes out license to carry on the business of a retail dealer, or vice versa, and carries it on in the same place, on the same premises, then it is reasonable for the commissioner to say that that wholesale dealer, being at the same time a retail dealer, should enter upon his books all packages brought in, and transferred to his retail business. The court charges you that the failure of a wholesale dealer, who is also a retail dealer, to keep this record

may be considered by the jury as evidence tending to support the theory of the Government, if in fact, you find that he failed to keep it. That is about all there is of that. It was argued by counsel for the defendants that it did not constitute a crime, and the court is in accord with that view. But if the Government has shown that there went into the wholesale establishment quantities of spirits bought from other places but not entered upon the retail books of the company that may be considered by the jury as a circumstance in connection with other (315) circumstances tending to show unlawful purpose."

Whereupon, the defendant, by its counsel, did then and there, while the jury was still in the box and at the bar, and in apt time, object and except to the refusal of the court to charge the jury as requested, and to the charge of the court as given in lieu thereof.

The said objection and exception being made and taken in the form of the following paper, which at the close of the charge of the court to the jury, was signed and filed by defendants' counsel:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA. FOURTH CIRCUIT, AT GREENSBORO.

United States
vs.
The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy.

Exceptions to Refusal to charge Defendants' Requests, etc.

The defendants, while the jury are still in the jury box and at bar, respectfully except to His Honor's refusal to charge each and every of their special prayers for instructions, which were refused by him, and they further except to the modification of each and every of their special prayers for instructions which were modified by him; and they still further except to the giving of such instructions and to the giving of each of them so modified.

BURWELL & CANSLER,
BYNUM, SETTLE, ALEXANDER,
MOORE & ROLLINS,
For Defendants.

(316)

upon the ground that the law did not require the Old Nick Williams Company, as a retail liquor dealer, to make or keep such record of the packages of distilled spirits purchased by it for the purpose of being used and which were used by it in its business as a retail liquor dealer, but that as such retail liquor dealer, it had the right common to all retail liquor dealers, to purchase wholesale packages which were duly stamped, in such numbers and amounts as it might see fit, from licensed wholesale liquor dealers, without making any record whatever of the said transaction or reporting the same to the Collector or other government officials; and upon the ground further, that it also had the right, as such retail liquor dealer, to purchase retail packages or packages under five gallons from a retail and wholesale dealer of liquor in such quanties as it might desire, or to purchase retail packages in quantities not exceeding twenty gallons from any person though not a licensed whole-
(317) sale or retail liquor dealer, without making any record of such transaction or reporting the same to the said collector or other government official; and further the court should have charged the jury that they should not take into consideration the said regulation of the Commissioner of Internal Revenue above quoted, as the same was not evidence upon this matter for any purpose, and particularly as evidence to support the theory of the Government in this case; but should have charged the jury, as requested, that although they should be satisfied from the evidence that the Old Nick Williams Company did sell quantities of the spirits in retail packages greatly in excess of the amounts shown by its wholesale or rectifying books to have been charged off to its retail business, yet the fact that it did sell said quantities of liquor in retail packages in excess of the amounts so shown to have been charged off to the retail business, is not sufficient evidence to warrant the jury in finding beyond a reasonable doubt that the liquor so sold was sold by the defendant, the Old Nick Williams Company, in violation of law, or that it, the said company, is guilty of the offense charged in the first count in the bill of indictment, because the liquor thus sold might have been purchased from persons other than those shown by the wholesale or rectifying books of the Old Nick Williams Company for use in its business as a retail liquor dealer; and prayed that this bill of exceptions might be signed and sealed, and it is signed and sealed accordingly.

BILL OF EXCEPTIONS No. 23.

The defendant, Old Nick Williams Company, while the jury was still in the box and at the bar and in apt time, re-

quested the court in writing to give the following special instruction to the jury:

(318) "183. All the counts in the bill of indictment charge that all the various offences were committed jointly by the defendants. It is necessary that the prosecution should prove to the satisfaction of the jury and beyond a reasonable doubt that such offenses were so jointly committed, as charged, before they can convict the defendants on any of them. Therefore, even should the jury find that the offenses charged were committed by one or two of them, but that the other defendants did not participate or join in the commission of the offense, the jury will acquit all the defendants."

The court refused to give this special instruction to the jury as requested, whereupon, the defendant, Old Nick Williams Company, by its counsel, did then and there while the jury was still in the box and at the bar, object and except to such refusal.

The said objection and exception being made and taken in the form of the following paper, which at the close of the charge of the court to the jury, was signed and filed by defendants' counsel:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA. FOURTH CIRCUIT, AT GREENSBORO.

United States
vs.
The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy.

Exceptions to Refusal to charge Defendants' Requests, etc.

The defendants, while the jury are still in the jury box and at bar, respectfully except to His Honor's refusal to charge each and every of their special prayers for instructions, which were refused by him, and they further except to the modification of each and every of their special prayers for instructions which were modified by him; and they still further except to the giving of such instructions and to the giving of each of them so modified.

BURWELL & CANSLER,
BYNUM, SETTLE, ALEXANDER,
MOORE & ROLLINS,
For Defendants.

(319)

upon the ground that it was necessary in this case that the prosecution should prove to the satisfaction of the jury and beyond a reasonable doubt that the offenses charged in the first count in the bill of indictment was jointly committed by the said company and the other defendants named in said bill, N. Glenn Williams and D. E. Kennedy, the allegation being that the act charged in the first count in the bill of indictment was jointly committed by each of the defendants, the jury could not convict the defendant, Old Nick Williams Company, unless it should become fully satisfied from the evidence beyond a reasonable doubt that the act was committed as charged; that is, that the act charged was jointly committed by said defendants; and prayed that this bill of exceptions might be signed and sealed, and it is signed and sealed accordingly.

BILL OF EXCEPTIONS No. 24.

(320) At the close of the evidence and while the jury was still in the box and at the bar, and in apt time, the defendants, Old Nick Williams Company, by its counsel, requested the court in writing that it charge the jury as follows:

"184. There is no evidence in the case that the offenses charged in the bill were jointly committed by the defendants. The jury will, therefore, return a general verdict of not guilty."

All of the evidence introduced in this case is incorporated herein as a part of Bill of Exceptions No. 1, and the same is now referred to and hereby incorporated herein and made a part of this bill of exceptions.

The court refused to give this special instruction to the jury as requested, whereupon, the defendant, Old Nick Williams Company, by its counsel, did then and there, while the jury was still in the box and at the bar, and in apt time, object and except to such refusal.

The said objection and exception being made and taken in the form of the following paper, which at the close of the charge of the court to the jury, was signed and filed by defendants' counsel:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA. FOURTH CIRCUIT, AT GREENSBORO.

United States
vs.
The Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy.

Exceptions to Refusal to charge Defendants' Requests, etc.

The defendants, while the jury are still in the jury box and at bar, respectfully except to His Honor's refusal to charge each and every of their special prayers for instructions, which were refused by him, and they further except to the modification of each and every of their special prayers for instructions which were modified by him; and they still further except to the giving of such instructions and to the giving of each of them so modified.

BURWELL & CANSLER,
BYNUM, SETTLE, ALEXANDER,
MOORE & ROLLINS,
For Defendants.

upon the ground that there is no evidence in the case that the offenses charged in the first count in the bill of indictment were jointly committed by the defendants, and that, therefore, it was the duty of the court to instruct the jury to return a verdict of not guilty; and prayed that this bill of exceptions might be signed and sealed and it is signed and sealed accordingly.

BILL OF EXCEPTIONS No. 25.

The jury returned a verdict of not guilty as to all of the defendants, except the defendant, Old Nick Williams Company, upon all the counts, and a verdict of guilty upon the first count as to the defendant, Old Nick Williams Company, only. The defendant, Old Nick Williams Company, moved the court as appears in the record, for the errors in these bills of excep- (321) tions stated, in arrest of judgment against it. The court refused this motion, whereupon the defendant, Old Nick Williams Company, by its counsel, did then and there, in apt time, object and except to such refusal of the court; and prayed that this bill of exceptions might be signed and sealed, and it is signed and sealed accordingly.

BILL OF EXCEPTIONS No. 26.

The defendant, Old Nick Williams Company, upon the return of the verdict herein against it, finding it guilty upon the first count in the bill of indictment, after moving in arrest of judgment, as above stated, and before the judgment of the court was entered upon the verdict, duly moved the court for a new trial of this case because of the errors alleged and set forth in the foregoing bills of exceptions. The court, after argument of counsel, refused this motion and refused to grant to the defendant a new trial, whereupon, the defendant, Old Nick

Williams Company, by its counsel, did then and there and in apt time, object and except to such refusal, upon the ground that the same was error, said error consisting in the matters and things alleged and stated in the foregoing bills of exceptions; and prayed that this bill of exceptions might be signed and sealed; and it is signed and sealed accordingly.

W. P. BYNUM, JR.,
BURWELL & CANSLER,
THOS. SETTLE,
J. E. ALEXANDER,
MOORE & ROLLINS,
Attys. for Old Nick Williams Company.

The foregoing bill of exceptions is allowed by the court, with the understanding that the testimony to be included in the first exception and used as a reference in other exceptions, is to be as agreed upon between counsel for the government and counsel for the defendants.

(Signed) JAS. E. BOYD,
U. S. Dist. Judge.

Filed in this office Apr. 14, 1906.

SAM'L L. TROGDON, Clerk.

Filed in this office Aug. 27, 1906.

SAM'L L. TROGDON, Clerk.

PETITION FOR WRIT OF ERROR.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, FOURTH CIRCUIT, AT GREENSBORO.

United States of America
vs.
Old Nick Williams Company. } At Law.

PETITION FOR WRIT OF ERROR.

(322) And now comes the defendant, Old Nick Williams Company, herein and says that on or about the 28th day of November, 1905, this court entered judgment herein in favor

of the plaintiff and against the defendant; in which judgment and the proceedings had prior thereunto in this case, certain errors were permitted to the prejudice of this defendant; all of which will more fully in detail appear from the assignment of errors which is filed with this petition.

Wherefore this defendant, Old Nick Williams Company, prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Fourth Circuit for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

BURWELL & CANSLER,

BYNUM, SETTLE, ALEXANDER,

MOORE & ROLLINS,

Attorneys for the defendant, Old Nick Williams Company.

ASSIGNMENTS OF ERROR.

(323)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

FOURTH CIRCUIT, AT GREENSBORO.

United States of America,
vs.
Old Nick Williams Company. } Assignments of Error.

The defendant, Old Nick Williams Company, in connection with its petition for a writ of error, makes the following assignments of errors which it avers occurred upon the trial of the case, to-wit:

I.

The court erred in refusing to give to the jury the following special instruction tendered by the defendant, to-wit:

"Upon all the evidence in this case, the court instructs the jury to find the defendant, the Old Nick Williams Company, not guilty of the charge contained in the first count in the bill," and in charging the jury as follows:

"We now come to consider the case with regard to the responsibility of a corporate body. A corporation, gentlemen, is not a natural body,—it is a mere creature of the law—what is

called a legal entity, having its existence by virtue of the law, with its business and affairs controlled, directed, managed and carried on through its officers, its managers and agents, whoever they may be. A corporation cannot act of itself because it is not tangible,—it has no personality; necessarily if a corporation becomes liable, either civilly or criminally, it must become (324) so by reason of the act of its authorized agent, or agents,

"Take, for instance, a railroad corporation. The corporation itself cannot operate a train; the corporation itself cannot make a contract; the corporation itself cannot endanger the safety of a passenger; the corporation itself cannot deal wrongfully with its employees. But the corporation itself, by reason of its human instrumentalities called upon to manage, conduct and carry on its business, can be made responsible. The town ordinance, which forbids a train to run at a greater rate of speed than that named in its ordinance within its limits, could only be violated by reason of the fact that some agent of the railroad company exceeded the speed. The railroad company contracting to transport a passenger safely from one point to another, could only be made responsible for the violation of such contract—for a failure to perform such contract—because some one of its agents in charge or in authority to control had violated the contract. So with this corporation.

"Gentlemen, this corporation can only be made criminally responsible by virtue of the acts of its agents; and the law says it may be made criminally responsible if its agents, in carrying on its business, violate the criminal law.

"If, therefore, gentlemen, you are satisfied from the testimony, beyond this reasonable doubt, which I have called to your attention, that the Old Nick Williams Co., this corporation, acting through its president or its other various agents, violated (325) the laws which I have called to your attention, then the company would be guilty. If that company and its corporate authority were used by any of its various agents in the conduct of the business which it had undertaken for the purpose of violating these laws, then the corporation is guilty. Not only is the corporation guilty, but the officer who carried within his breast, or the agent who carried within his breast, the intention to so use the corporation, would be guilty. Not only that, but others indicted for acting in concert, and joining in a common purpose with the view in the ultimate end of a violation of the criminal laws of the United States would be guilty. The company was authorized, as a corporation, to carry on the business of a rectifier, and although the president had no knowledge of it, yet if other agents of the company used the name and the business rights of the company to defraud the Government of

the United States, the company would still be guilty, although it may have been done without the knowledge and consent of its chief officer, because the other agents, the other directors, the other managers, would be equally competent to involve the company by their acts in the commission of a criminal offence."

upon the ground that in no view of the evidence, giving the plaintiff, the United States of America, the benefit of all of the same and of all reasonable inferences and deductions to be drawn therefrom, is the defendant guilty of the charge against it contained in the first count in the bill of indictment; and (326) for that further, it nowhere appears in evidence, nor can it be inferred or deduced from the same, that the defendant, the Old Nick Williams Company, being as charged in the bill of indictment a corporation, had or was capable of having, the wrongful and fraudulent intent denounced by the statute in such cases and charged against it in the first count in the bill of indictment, and for that, still further, the defendant, Old Nick Williams Company, being as charged in the bill of indictment and as shown by the evidence, a corporation, it cannot in law have or be charged with the fraudulent intent, alone or with others, to defraud the United States of the tax on spirits rectified by it as charged in the bill of indictment.

II.

The court erred in refusing to give to the jury the following special instruction tendered by the defendant, to-wit:

"There is no evidence in this case that the Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy did, as charged in the bill of indictment, engage in and carry on the business of rectifiers of distilled spirits, and therefore the jury will return a verdict of not guilty as to all of said defendants."

upon the ground that the evidence did not show nor could it be inferred or deduced from the same, that the Old Nick Williams Company, N. Glenn Williams and D. E. Kennedy, did, as charged in the bill of indictment, engage in and carry on the business of rectifiers of distilled spirits. On the contrary, the evidence clearly shows, and it shows nothing else, that the Old Nick Williams Company, not with the defendants N. Glenn Williams and D. E. Kennedy, as alleged, but entirely alone, in its corporate name and for itself, without the other defendants, or either of them, engaged in and carried on the business of rectifiers of distilled spirits.

III.

(327)

The court erred in admitting the evidence offered by the plaintiff of W. H. Chapman, a revenue agent, and of other persons with him, that he, acting under the directions of the District Attorney prosecuting the case, had been sent as a revenue agent with other persons, some of whom were admitted to be expert distillers, to the distillery in the town of Williams, Yadkin County, North Carolina, being then operated under a license issued to one D. C. Foster, and being the same formerly operated under a license issued to the defendant, Kennedy, and the same conveyed by the defendant, Old Nick Williams Company, to the said Kennedy on the first day of February, 1903, and the same conveyed by the said Kennedy to the said Foster by deed dated on the 9th day of May, 1905, for the purpose of making a test of its whiskey producing capacity from a given quantity of grain, or a given quantity of meal ground from grain, and that said revenue agent, W. H. Chapman and such other persons, while at said distillery making such inspection and tests, took the same into their possession and distilled the beer from the meal then collected in two of the fermenting tubs in said distillery, and that by distilling in said distillery the beer collected in the two fermentors or tubs therein, said test showed that four and one-half gallons of spirits were produced by said distillery from each bushel of grain used therein; upon the ground that the said testimony should not have been allowed as against Old Nick Williams Company; that the same was incompetent, irrelevant and immaterial, and for that still further, (328) in no event could said tests or evidence concerning the same be competent against the defendant, Old Nick Williams Company, in passing upon the question of the guilt or innocence of said company of the charge contained in the first count of said bill of indictment.

IV.

The court erred in refusing to give to the jury the following special instruction tendered by the defendant, to-wit:

"98. The jury is instructed to consider the evidence of the test made at the distillery under the direction of Col. Chapman, during the trial of this case, only for the purpose of showing or tending to show the capacity of said distillery to produce distilled spirits from a given quantity of grain or material, as throwing light upon the question as to whether the defendants or either of them operated said distillery during the

time referred to in the bill of indictment with intent to defraud the government. And the jury is instructed in passing upon the question not to consider the evidence of the government witnesses tending to show that more than the authorized quantity of meal was used in producing the beer from which the test was made, as that fact, if proved, could not have any bearing whatever upon any charge contained in the bill of indictment, as there is no evidence in this case tending to show that the defendants or either of them were responsible for the operation of the said distillery at or immediately before said tests were made."

(329)

upon the ground that the fact testified to by the witnesses that in their opinion more than the authorized quantity of meal was used in producing the beer from which the test was made, could have no bearing whatever upon the charge contained in the first count in the bill of indictment against it, and upon the further ground that there is no evidence in this case tending to show that the defendant, Old Nick Williams Company, was responsible for the operation of said distillery at or immediately before the time when said tests were made; and upon the ground, further, that in no event could such tests or evidence of the same be competent, relevant, or material, upon the issue raised by the bill of indictment and the plea of not guilty, so far as said issue relates to the charge against the defendant, contained in the first count in the bill of indictment; and still further upon the ground that in no view of the case could said tests or evidence concerning the same have been competent, relevant, or material upon the charge contained in the first count in said bill of indictment, unless the jury should find and be satisfied beyond a reasonable doubt from the evidence that the defendant Old Nick Williams Company, was the owner of or interested in the operation of said distillery at the time said tests were made; and upon the grounds still further, that upon the entire in evidence in the case, it plainly appears, as ultimately found by the jury, that the defendant, Old Nick Williams Company, did not own said distillery, or any interest in the same, and that it was not responsible for, or interested in, the operation or management thereof.

V.

The court erred in refusing to give to the jury the following special instruction tendered by the defendant, to-wit:

(330)

"99. Unless the jury shall be satisfied beyond a reasonable

doubt that the distillery which was used by Revenue Agent Chapman and others on the 2nd inst. for the purpose of testing its capacity, and which was then being run in the name of D. C. Foster, was not the property of the said Foster, but in reality the property of the defendants and operated by them, then the court charges the jury that they can only consider the evidence of said test for the purpose of showing the number of gallons of spirits which might be distilled from a given quantity of beer as contained in the two fermenting tubs as used in making said test, and they will not consider any evidence of the conditions and surroundings of said distillery at the time the test was made, which do not appear to have existed when the same was being operated in the name of D. E. Kennedy for the purpose of proving or tending to prove that said distillery was operated by the defendants for the purpose of defrauding the government of the tax upon the spirits distilled thereat, as charged in the twelfth count of the bill of indictment. In other words, unless the said distillery was owned and being operated by the defendants at the time the test was made, the evidence of the government's witnesses tending to show that more than 101 bushels of grain was used in making the mash in the fermenting tubs used in making said test, cannot be considered by the jury in passing upon the guilt or innocence of the defendants in this case. Neither would the acts and declarations of the distiller and others engaged in operating the said distillery at said time be competent evidence against the defendant in this case, unless the jury should be satisfied that the said distillery was then being operated by the defendants and not by the said Foster."

upon the ground that in no view of the case was it competent, relevant, or material to prove the matters relating to said tests, so far as the defendant, Old Nick Williams Company, was concerned, unless it was shown to the jury beyond a reasonable (331) doubt from the evidence alone that the distillery was not the property of the said Foster, but in reality the property of the defendants and operated by them; and upon the ground further that it was not competent for the jury to consider the evidence of the said tests as against the defendant, Old Nick Williams Company, for the purpose of showing the number of gallons of spirits which might be distilled from a given quantity of material or beer as contained in the two fermenting tubs used in making said tests, unless the jury should first find and be satisfied from the evidence alone beyond a reasonable doubt, that the defendant, Old Nick Williams Company, was the owner of or interested in said distillery or the operation of

the same; and further, upon the ground, that in no event was it competent, pertinent or material to consider the said tests or evidence concerning the same, unless the jury should find that the conditions and surroundings at said distillery at the time said tests were made were the same as existed and surrounded the same at the time the defendant, D. E. Kennedy, owned or operated the same; and, further, that the said tests and evidence concerning the same was incompetent, irrelevant and immaterial, unless the said distillery was owned and being operated by the defendants at the time the test was made.

VI.

The court erred in refusing to give the following special instruction to the jury tendered by the defendant, to-wit: (332)

"100. But if the jury shall be satisfied that the said distillery was in reality the property of the defendants and being operated by them in the name of the said Foster, then the court charges the jury that Revenue Agent Chapman was not as a matter of law, in the absence of the defendants or without their consent, authorized to take possession of the said distillery for the purpose of actually operating the same to test its capacity in order that evidence of said test might be used upon the trial of this or any other indictment against these defendants, and the jury should not consider the evidence of the government's witnesses with reference to the result of said test, or even the fact that the test was made, in passing upon the guilt or innocence of the defendants in this case.

upon the ground, that even should the jury be satisfied from the evidence that the distillery was in reality the property of the defendant, Old Nick Williams Company, and was being operated by them in the name of the said Foster, in the absence of the defendants or without their consent, the revenue agent, Chapman, was not authorized to take possession of said distillery for the purpose of actually operating the same during the trial of this case and while the defendant were answering at the bar of this court to the charges contained in the bill of indictment, to test its capacity in order that evidence of said test might be used upon the trial against the said defendants, and, further, upon the ground that under these circumstances the jury should not have been permitted to consider the evidence of the government's witnesses with reference to the said tests, or even the fact that the tests were made, in passing upon the guilt or innocence of the defendants in this case.

VII.

(333)

The court erred in refusing to give the following special instruction to the jury tendered by the defendant, to-wit:

"101. The court instructs the jury as a matter of law, that these defendants, or either of them, cannot be held responsible for the acts, conduct and declarations of those in charge of the operation of the distillery being run in the name of D. C. Foster at and before the test was made by Revenue Agent Chapman on the 2nd inst., as it is not denied that at and prior to said time the defendants Williams and Kennedy were absent in attendance upon this court, and there is no evidence in this case that the persons so in charge of said distillery were the agents of the defendants or either of them, or authorized by them to do or say the things testified to by the government's witnesses. Therefore the court charges the jury in passing upon the guilt or innocence of these defendants, not to consider the evidence of the acts, conduct and declarations of the persons so in charge of said distillery at and before said test was made."

upon the ground that under the circumstances as shown in the evidence, the defendant, Old Nick Williams Company, could not be held responsible for the acts, conduct and declarations of those in charge of the operation of the distillery being run in the name of D. C. Foster at and before the test was made by Revenue Agent Chapman on the 2nd inst.; and upon the ground, further, that there is no evidence in this case that the persons in charge of said distillery at the time said tests were made, were the agents of the defendant, Old Nick Williams Company, to do or say the things testified to by the gov-
(334) ernment's witnesses; and upon the further ground, that it was the duty of the court to charge the jury that in passing upon the guilt or innocence of the defendant, Old Nick Williams Company, not to consider the evidence of the acts, conduct and declarations of the persons in charge of the said distillery in the absence of the defendant or of anyone authorized to represent it at and before said tests were made.

VIII.

The court erred in refusing to give to the jury the following special instruction tendered by the defendant, to-wit:

"102. The evidence of the government's witnesses as to the result of the test made by them at the distillery on the 2nd inst.

and of the acts, conduct and declarations of those engaged in operating said distillery at the time, if competent at all, can only be considered by the jury in passing upon the offense charged in the twelfth count in the bill of indictment, and the jury will not in any event consider it for any other purpose."

upon the ground that the evidence of the government's witnesses as to the result of the test made by them at the distillery on the 2nd inst., and of the acts, conduct and declarations of those engaged in operating said distillery at the time, if competent at all, should only be considered by the jury in passing upon the offense charged in the twelfth count of the bill of indictment; and further that such evidence could have no bearing whatever upon, and was wholly incompetent, irrelevant and immaterial as to the charge contained in the first count in the bill of indictment.

IX.

(335)

The court erred in refusing to give to the jury the following special instruction tendered by the defendant, to-wit:

"In the first, ninth, tenth and twelfth counts in the bill of indictment, the defendants are charged with doing the acts therein alleged with the intent to defraud the United States of its tax. This intent is a necessary ingredient and element of the crimes charged in the said counts. It is this intent to defraud the United States of its tax which makes the guilt of the defendants, and in the absence of such intent there is no violation of the Act of Congress prohibiting the doing of the things which are charged in the said counts. This intent is the essence and essential necessary element in the crime charged in the said counts and denounced by law."

upon the ground that the fraudulent intent of the defendant in doing the act charged against it is a necessary element and ingredient in the crime charged in the first count of the bill of indictment; that, in the absence of such intent there could be no violation of the Act of Congress prohibiting the doing of the things charged in said count in the bill of indictment.

X.

(336)

The court erred in refusing to give to the jury the following special instruction tendered by the defendant, to-wit:

"107. The jury cannot, therefore, presume that the defendants or any of them are guilty upon the first, ninth, tenth and twelfth counts, even should they find that they did the acts charged in said counts. It is incumbent upon the government in this case to go further and to satisfy you fully and beyond reasonable doubt that they did those acts charged in the said counts with the wrongful intent to injure and defraud the United States of its tax as charged in the said counts."

upon the ground that in this case as to the charge contained in the first count in the bill of indictment, it was not only the duty of the government to prove and satisfy the jury beyond a reasonable doubt, that the defendant did the acts charged in said counts, but that it did such acts with the wrongful and fraudulent intent to defraud the United States of its tax as charged in said count.

XI.

The court erred in refusing to give to the jury the following special instruction tendered by the defendant, to-wit:

"108. There is no presumption of the guilt of the defendants arising from the fact that they did the acts charged against them in the bill of indictment. If the jury shall find that the defendants did do such acts charged in the first, ninth, tenth and twelfth counts and in the way and manner charged therein, they will not presume from the doing of such acts that the defendants are guilty, for it is not the doing of such acts that constitutes guilt, but it is the doing of the acts charged with the wrongful intent to defraud the United States of its tax; and unless such intent exists and the jury should be satisfied beyond all reasonable doubt from the evidence alone that such intent existed, they cannot convict the defendants or either of them upon said counts."

upon the ground that there is no presumption of the guilt of the defendant arising from the fact that it did the acts charged (337) in the bill of indictment, for if the jury should find, that the defendant did such acts, they would not be authorized to presume from the doing of such acts alone that the defendant was guilty, for it is the doing of the acts charged with the wrongful intent to defraud the United States of its tax that constitutes the guilt of the defendant, if there was guilt at all.

XII.

The court erred in refusing to give to the jury the following special instruction tendered by the defendant, to-wit:

"109. If the acts charged in the first, ninth, tenth and twelfth counts were committed by the defendants for any other purpose or with any other intent than to defraud the United States of its tax, then the defendants are not guilty as charged in the said counts, and the jury will return a verdict of not guilty on the said counts."

upon the ground that the defendant could not be guilty of the crime charged in the first count in the bill of indictment in the absence of any intent to defraud the United States of its tax, as charged in the said count.

XIII.

The court erred in refusing to give to the jury the following special instruction tendered by the defendant, to-wit:

"110. The first count in the bill of indictment charges the defendants, The Old Nick Williams Company, a corporation, N. Glenn Williams, and D. E. Kennedy, with having power and authority to engage in and carry on the business of a rectifier of distilled spirits and that they (338) did, being then and there engaged in and carrying on the business of a rectifier of distilled spirits, engage in and carry on the same with intent to defraud the United States of the tax upon the spirits rectified by them. The burden is upon the government to show all the material elements of the crimes charged against the defendants, and the government must show this to the satisfaction of the jury and beyond a reasonable doubt. It must show, first, that they did engage in and carry on the business of rectifiers of distilled spirits with power and authority derived from the government to do so. Second, it must so satisfy the jury that they so engaged in and carried on the business of rectifiers of distilled spirits with the wrongful intent to defraud the United States of the tax upon the spirits rectified by them. It is not the mere engaging in or carrying on the business of a rectifier which makes the defendants guilty. It is the wrongful intent to defraud the United States of its tax which makes the guilt, and if the jury should find from the evidence and beyond a reasonable doubt that the defendants did have power and authority to engage in and car-

ry on the business of a rectifier of distilled spirits and that they did engage in and carry on such business, but they should fail to be satisfied from the evidence beyond a reasonable doubt that the defendants had such wrongful and fraudulent intent in so engaging in and carrying on the said business, the jury would return a verdict of not guilty against them on said count.

upon the ground that the burden devolved upon the government of showing to the jury from the evidence alone and beyond a reasonable doubt that the defendant, Old Nick Williams Company, did engage in and carry on the business of rectifier of (339) distilled spirits, and that it did, while engaged in and carrying on said business, engage in and carry on the same with the intent to defraud the United States of the tax upon the spirits rectified by it. It was not the mere engaging in or carrying on the business of rectifier which made the defendant guilty, but it was the wrongful intent to defraud the United States of its tax which makes the guilt: and, although the jury shall find from the evidence and beyond a reasonable doubt that the defendant, Old Nick Williams Company, had the power and authority to engage in and carry on the business of rectifier of distilled spirits, and that it did engage in and carry on such business, if they should fail to be satisfied beyond a reasonable doubt that the defendants had such wrongful and fraudulent intent in engaging in and carrying on the business, a verdict of not guilty should have been returned by them upon said count.

XIV.

The court erred in refusing to give to the jury the following special instruction tendered by the defendant, to-wit:

"121. 'Proof beyond a reasonable doubt is such as will produce an abiding conviction in the mind to a moral certainty that the fact exists that is claimed to exist so that you feel certain that it exists. A balance of proof is not sufficient. A juror in a criminal case ought not to condemn unless the evidence excludes from his mind all reasonable doubt; unless he be so convinced, no matter what the class of the evidence of the defendant's guilt, that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to his own dearest personal interests'," and in charging the jury instead thereof as follows:
(340)

"The term (reasonable doubt) that is used in law and de-

scribed to be a reasonable doubt, has been given by various courts, and various law writers, a definition. The most terse definition that I have heard is where the judge said that 'a reasonable doubt is a doubt such as a juror might be able to give a reason for.' But that, gentlemen, does not probably express the idea, because a juror might have a doubt and a doubt which, in his mind, was sufficient, and yet he might not be able to explain to another person the basis of his doubt sufficiently to convey to the mind of the other person that there was reason for it. It is a reason which exists in the mind of the juror, based upon practical experience, based upon circumstances, based upon sound judgment. Probably the best definition of a reasonable doubt can be given by an illustration. The facts in the case, that is, such of the testimony as tends to establish facts, as delivered by the witnesses, is the guide to lead the minds of the jury to a conclusion. If, by the evidence, the way is blazed so distinctly that the mind travels readily to the terminus and there reaches guilt, it is the duty of the jury to return a verdict of guilty. And, although the way may become indistinct at a point, yet, if, after examination, the direct way is eventually discovered from the testimony and the mind travels along and reaches the end and finds there located the guilt of the accused there is no reasonable doubt. But, if, viewing all the evidence, both that of the prosecution and the defense, the index to the way becomes indistinct and uncertain at any material point, so that the mind halts and hesitates and is unable, when examining the marks of the blaze along the way, to determine which direction shall be taken,—which is the proper direction to follow,—such a situation would, in the opinion of the court, raise a doubt, based upon reason, sufficient to warrant acquittal—such would be a reasonable doubt."

(341)

for that the definition stated in the special prayer is the proper one, and should have been given to the jury, and upon the ground, further, that the defendant was entitled to have the court tell the jury as prayed in this special instruction that a balance of the proof is not sufficient; and further, the defendant was entitled to have the court charge the jury that "A juror in a criminal case ought not to condemn unless the evidence excludes from his mind all reasonable doubt; unless he be convinced by the evidence, no matter what the class of the evidence of the defendant's guilt, so that a prudent man would feel safe to act upon the conviction in matters of the greatest concern and importance to his own dearest personal interests;" and upon the further ground that the charge, as given and the

definition contained therein, is not sufficient in law and not in compliance with, or in response to, the request made by the defendant, and that the illustration used therein is misleading and does not correctly instruct the jury as to their duty in determining the question of reasonable doubt.

XV.

The court erred in refusing to give to the jury the following special instruction tendered by the defendant, to-wit:

"123. The evidence in this case discloses the fact that at the time referred to in the bill of indictment the defendant, The Old Nick Williams Company, was engaged in and carrying on the business of a retail liquor dealer and had paid the government the special tax imposed by law upon said business. This (342) being true, the court charges the jury that The Old Nick Williams Company as such retail liquor dealer, had the legal right to purchase wholesale packages of spirits duly stamped and place the same in its retail establishment without making entries of such purchase upon the wholesale or rectifying books which the government required the said company to keep in connection with its business as a wholesale liquor dealer or rectifier of distilled spirits. The Old Nick Williams Company also had the right as such retail liquor dealer to draw off from such wholesale packages so purchased by it and placed in its retail establishment retail packages or packages of less than five gallons and to sell the same without entering such transaction upon any books required by law to be kept by it as a wholesale liquor dealer or rectifier of distilled spirits. And unless the jury shall be satisfied beyond a reasonable doubt from the evidence that the defendants did not draw off the retail packages of spirits which were shipped by The Old Nick Williams Company from wholesale packages purchased by it as a retail liquor dealer, but in fact drew off the said retail packages or some of them from its rectified or wholesale packages which had been purchased by it for or charged by it to retail or obtained them from non-tax paid packages otherwise acquired, then the jury could not convict the defendants of any of the offenses charged in the bill of indictment, unless the government has satisfied you beyond a reasonable doubt of their guilt upon evidence other than that of the mere sales of retail packages of spirits in quantities in excess of the amounts which appear upon the wholesale or rectifying books of The Old Nick Williams Company to have been disposed of by it," and in (343) charging the jury as follows:

"Gentlemen of the jury. The court inadvertently overlooked a matter which is involved in this case, and which is insisted upon by the District Attorney, as an evidence of guilt, and which, on the other hand, the defendants' counsel insist is not a requirement, and that is, the regulation issued by the Commissioner of Internal Revenue in regard to the duty of a wholesale liquor dealer to keep a record when he joins his business with that of a retail dealer.

"The court will charge you that such a regulation is a reasonable regulation. The commissioner has a right to make such a regulation, but the violation of the regulation does not constitute a criminal offence, because the commissioner has no right, even with the approval of the Secretary of the Treasury, to make a regulation, the violation of which would constitute a crime, but he has a right to make the regulation with a view to affording a check upon such persons as engage in both the wholesale and retail business of liquor dealers together; that is, where a person being a wholesale liquor dealer takes out license to carry on the business of a retail dealer, or vice versa, and carries it on in the same place, on the same premises, then it is reasonable for the commissioner to say that the wholesale dealer, being at the same time a retail dealer, should enter upon his books all packages brought in, and transferred to his retail business. The court charges you that the failure of a wholesale dealer, who is also a retail dealer, to keep this record may be considered by the jury as evidence tending to support the theory of the Government, if in fact, you find that he failed to keep it. This is about all there is of that. It was argued by counsel for the defendants that it did not constitute a crime, and the court is in accord with that view. But if the Government has shown that there went into the wholesale establishment quantities of spirits bought from other places but not entered upon the retail books of the company that may be considered by the jury as a circumstance in connection with other circumstances tending to show unlawful purpose."

for that upon the facts shown and admitted, the defendant, Old Nick Williams Company, as such retail liquor dealer, had the legal right to purchase wholesale packages of spirits duly stamped and place the same in its retail establishment without making entries of such purchase upon the wholesale, or rectifying books which the government required of the said company to keep in connection with its business as a wholesale liquor dealer or rectifier of distilled spirits; and further, upon the ground that said defendant company had the right as such retail liquor dealer to draw off from such wholesale pack-

ages so purchased by it and placed in its retail establishment, retail packages of less than five gallons, and to sell the same without entering the said transactions upon any books required by law to be kept by it as a wholesale liquor dealer or rectifier of distilled spirits; and further upon the ground that the defendant was entitled to have the court tell the jury, that (345) unless the jury shall be satisfied beyond a reasonable doubt from the evidence that the defendant, Old Nick Williams Company did not draw off the retail packages of spirits which were shipped by the Old Nick Williams Company from wholesale packages purchased by it as a retail dealer, but in fact drew off the said retail packages, or some of them from its rectified and wholesale packages, which had been purchased by it for or charged by it to retail, or obtained them from non-tax paid packages otherwise acquired, that then the jury could not convict the defendant of the offense charged in the first count of the bill of indictment, unless the government had satisfied the jury beyond a reasonable doubt of the guilt of the defendants upon evidence other than that of the mere sale of the retail packages of spirits in quantities in excess of the amounts which appear upon the wholesale or rectifying books of the said company to have been disposed of by it; and upon the further ground that said regulation by the Commissioner of Internal Revenue referred to in the charge of the court to the jury, was not evidence competent to be submitted to the jury for any purpose; and for that the jury should not have been permitted to consider the same as tending to support the theory of the government or for any other purpose.

XVI.

The court erred in refusing to give to the jury the following special instruction tendered by the defendant, to-wit:

"124. In other words, before the government can convict the defendants or either of them of any of the offenses charged in the bill of indictment upon the evidence that The Old Nick Williams Company had from time to time sold large quantities of retail packages of spirits in excess of the amounts which (346) it had theretofore caused to be charged off to retail and upon its wholesale or rectifying books required by the government to be kept by it, the jury must be satisfied beyond a reasonable doubt that the retail packages so sold were in fact not liquors purchased by the said company in its capacity as a retail liquor dealer, in duly stamped wholesale packages, but that the said retail packages so sold and shipped had been drawn

off from its wholesale or rectified packages which had not been charged off to retail, or were packages otherwise acquired contrary to law and upon which the tax had not been paid."

upon the ground that upon the evidence and particularly upon the evidence incorporated into bills of exception No. 16, the jury should have been instructed by the court that they must be satisfied beyond a reasonable doubt that the retail packages so sold were in fact not liquors purchased by the defendant company in its capacity as a retail liquor dealer in duly stamped wholesale packages, but that the said retail packages so sold and shipped had been drawn off from its wholesale or rectified packages which had not been charged off to retail, or were packages otherwise acquired contrary to law and upon which the tax had not been paid.

XVII.

The court erred in refusing to give to the jury the following special instruction tendered by the defendant, to-wit:
(347)

"125. The court has permitted the prosecution to introduce evidence tending to show amounts of spirits sold and shipped by the defendant, The Old Nick Williams Company. This evidence by itself is not sufficient to justify the jury in returning a verdict against the defendants or any of them. If the jury should find from this evidence that the defendant, The Old Nick Williams Company, sold or disposed of more distilled and rectified spiritous liquors than the evidence shows it bought or otherwise obtained, this will not justify you in returning a verdict of guilty."

upon the ground that the evidence incorporated into Bill of Exceptions No. 17, to-wit, that at the time referred to in the bill of indictment charging the defendant, Old Nick Williams Company, with the commission of crime against the laws of the United States, the defendant, Old Nick Williams Company, was engaged in carrying on the business of a retail liquor dealer, and that it had paid the government the special tax imposed by law upon said business; that it was, besides, a licensed rectifier of distilled spirits and a licensed wholesaler of the same; that it had from time to time sold large quantities of retail packages of spirits in excess of the amount which it had theretofore caused to be charged off to retail, and upon its wholesale or rectifying books required by the government to be kept by it, was not by itself sufficient to justify the jury in returning

a verdict against the defendant; and upon the further ground that if the jury should find from the evidence that the defendant sold or disposed of more distilled and rectified spirituous (348) liquors than the evidence from its books or otherwise showed it bought or otherwise obtained, still the jury would not be justified in returning a verdict of guilty against it.

XVIII.

The court erred in refusing to give to the jury the following special instruction tendered by the defendant, to-wit:

"127. The defendants are not required to show how, where, from whom or under what circumstances they obtained the spirits sold by them, but the government must show you, if it becomes material in this case, to your satisfaction beyond a reasonable doubt, that they obtained them in violation of the law."

upon the ground that the defendant was not required to show how, where, from whom or under what circumstances it obtained the spirit sold by it, but it was the duty of the government to show to the satisfaction of the jury and beyond a reasonable doubt, that it obtained the same in violation of the law.

XIX.

The court erred in refusing to give to the jury the following special instruction tendered by the defendant, to-wit:

"128. The defendants can wait in this case until the government has shown guilt. They are not guilty of a violation of the law simply because they sold more spirituous liquors than the evidence showed they distilled & bought, Kennedy being an authorized distiller, & the company being a rectifier, wholesaler and retailer of the same; nor are they called upon or required to explain how they became possessed of such spirituous liquors."

(349) upon the ground that the defendant was not guilty of a violation of the law with which it was charged, simply because it sold more spirituous liquors than the evidence showed it had bought, it being admitted by the prosecution that said defendant was an authorized and licenced rectifier and wholesaler of spirituous liquors, and further upon the ground that it was not called upon or required by law to explain how it became possessed of such spirituous liquors.

XX.

The court erred in refusing to give to the jury the following special instruction tendered by the defendant, to-wit:

"132. The fact, if true, that they, the defendants, did sell distilled spirits in a large quantity, does not put any burden upon them to explain or in any way account for their possession thereof."

upon the ground that the fact, if true, that the defendant, did sell distilled spirits in a large quantity did not put any burden upon it to explain or in any way account for their possession.

XXI.

The court erred in refusing to give to the jury the following special instruction tendered by the defendant, to-wit:
(350)

"Evidence of other transactions than those charged in the various counts of the bill of indictment, upon which the defendants are now being tried, can only be considered by the jury in so far as such evidence may tend to show the motive and intent with which the defendants did the acts charged in the bill of indictment, if they should find that they did such acts at all. Unless such evidence of other acts done by the defendants tend to throw light upon and aid the jury in determining the intent and purpose of the defendants in doing the acts charged against them, if you find they did do such acts at all, you must not give any weight to or consider such evidence of other acts at all. Although the jury may believe that the defendants are guilty of other offenses and violations of the law than those charged against them and that such other transactions about which the witnesses have been permitted to testify, constitute such offenses, the jury cannot convict the defendants upon this bill of indictment on the same, and the jury should therefore not confound the defendants acts and doings which appeared in the evidence, detailed as to other transactions than those charged in the bill of indictment with those acts charged in the bill; for though the jury may believe the defendants guilty of violations of the law other than those charged in the bill of indictment, they will not be justified in finding them guilty in this case for such violations; and the jury is instructed to put out of consideration all the evidence of other transactions and doings of the defendants or any of them, no matter how

wrongfully and unlawful the same may appear to the jury to be unless such transactions and doings tend to show the wrongful intent of the defendants in doing the acts charged in the bill of indictment."

upon the ground that the evidence of the transaction detailed (351) in Bill of Exception No. 21, being one not charged in the bill of indictment against it, could not be considered by the jury unless the jury shall find that it did in some way tend to throw light upon and aid the jury in determining the intent and purpose of the defendant in doing the act charged against it in the first count in the bill of indictment; and upon the ground further that it was the duty of the jury not to confound this act of the defendant, even if they found that it committed the act at all, with those acts charged in the bill of indictment against it, unless they should find that the said act in some way tended to throw light upon the act charged against the defendant in the bill of indictment.

XXII.

The court erred in refusing to give to the jury the following special instruction tendered by the defendant, to-wit:

"172. According to the undisputed evidence in this case, The Old Nick Williams Company, at the time mentioned in the bill of indictment, was by permission of the government, engaged in carrying on the business of a wholesale liquor dealer, the business of a rectifier of distilled spirits and the business of a retail liquor dealer, and had paid the special taxes required by the government to be paid for the privilege of carrying on each of said businesses. Under these circumstances it became the duty of The Old Nick Williams Company, when it purchased a package of distilled spirits in its capacity as a wholesale liquor dealer or a rectifier, which was to be used by it in its wholesale or rectifying business, to enter said transac- (352) tion upon its wholesale or rectifying books prescribed by the Commissioner of Internal Revenue for that purpose and to also enter upon said books such other information as the said commissioner required, including the fact of the sale of such package, when sold, to whom sold and also to make due report of said transaction to the Collector of the District upon forms provided by said Commissioner of Internal Revenue. But the law did not require the Old Nick Williams Company as retail liquor dealer to make or keep such record of packages of distilled spirits purchased by it for the purpose of being used and

which were used by it, in its business as a retail liquor dealer, and as such retail liquor dealer it had the right, common to all retail liquor dealers, to purchase wholesale packages which were duly stamped in such numbers and amounts as it might see fit, from licensed wholesale liquor dealers or distillers, without making any record whatever of said transaction or reporting the same to the Collector or other government official. It also had the right, as such retail liquor dealer, to purchase retail packages or packages under five gallons, from a retail and wholesale liquor dealer, in such quantities as it might desire, or to pur-
(353) chase retail packages in quantity not exceeding 20 gallons, from any person though not a licensed wholesale or retail liquor dealer, without making any record of any such transaction or reporting the same to said Collector or other government official. This being the law, the court charges you that although you should be satisfied from the evidence that The Old Nick Williams Company did sell quantities of spirits in retail packages greatly in excess of the amounts shown by its wholesale or rectifying books to have been charged off to its retail business, yet the fact that it did sell said quantities of liquor in retail packages in excess of the amount so shown to have been charged off to the retail business, is not sufficient evidence to warrant the jury in finding beyond a reasonable doubt that the liquor so sold was sold by the defendants or either of them in violation of law, or that they or either of them, are guilty of the offenses charged in the several counts in the bill of indictment, because the liquor thus sold may have been purchased from persons other than those shown by the wholesale or rectifying books of The Old Nick Williams Company for use in its business as a retail liquor dealer," and in charging the jury as follows:

"Gentlemen of the jury. The court inadvertently overlooked a matter which is involved in this case, and which is insisted upon by the District Attorney, as an evidence of guilt, and which, on the other hand, the defendants' counsel insist is not a requirement, and that is, the regulation issued by the Commissioner of Internal Revenue in regard to the duty of a wholesale liquor dealer to keep a record when he joins his business with that of a retail dealer.

"The court will charge you that such a regulation is a reasonable regulation. The commissioner has a right to make such a regulation, but the violation of the regulation does not constitute a criminal offence, because the commissioner has no right, even with the approval of the Secretary of the Treasury, to make a regulation, the violation of which would constitute a

crime, but he has a right to make the regulation with a view to affording a check upon such persons as engage in both the wholesale and retail business of liquor dealers together; that is, where a person being a wholesale liquor dealer takes out license to carry on the business of a retail dealer, or vice versa, and (354) carries it on the same place, on the same premises, then it is reasonable for the commissioner to say that the wholesale dealer, being at the same time a retail dealer, should enter upon his books all packages brought in, and transferred to his retail business. The court charges you that the failure of a wholesale dealer, who is also a retail dealer, to keep this record may be considered by the jury as evidence tending to support the theory of the Government, if in fact, you find that he failed to keep it. That is about all there is of that. It was argued by counsel for the defendants that it did not constitute a crime, and the court is in accord with that view. But if the Government has shown that there went into the wholesale establishment quantities of spirits bought from other places but not entered upon the retail books of the company that may be considered by the jury as a circumstance in connection with other circumstances tending to show unlawful purpose."

for that the law did not require the Old Nick Williams Company, as a retail liquor dealer, to make or keep such record of the packages of distilled spirits purchased by it for the purpose of being used and which were used by it in its business as a retail liquor dealer, but that as such retail liquor dealer, it had the right common to all retail liquor dealers, to purchase wholesale packages which were duly stamped, in such numbers and amounts as it might see fit, from licensed wholesale liquor dealers, without making any record whatever of the said transaction or reporting the same to the Collector or other government official or officials; and upon the ground further, that it also had the right, as such retail liquor dealer, to purchase retail packages or packages under five gallons from a retail or wholesale dealer of liquor, in such quantities as it might desire, or to purchase retail packages in quantities not exceeding twenty gallons from any person though not a licensed (355) wholesale or retail liquor dealer, without making any record of such transaction or reporting the same to the said collector or other government official; and further the court should have charged the jury that they should not take into consideration the said regulation of the Commissioner of Internal Revenue, quoted in Bill of Exceptions No. 22, and referred to in the charge of the court, as the same was not evidence upon this matter for any purpose, and particularly as evidence to sup-

port the theory of the Government in this case; but should have charged the jury, as requested, that although they should be satisfied from the evidence that the Old Nick Williams Company did sell quantities of spirits in retail packages greatly in excess of the amounts shown by its wholesale or rectifying books to have been charged off to its retail business, yet the fact that it did sell such quantities of liquor in retail packages in excess of the amounts so shown to have been charged off to the retail business, is not sufficient evidence to warrant the jury in finding beyond a reasonable doubt that the liquor so sold was sold by the defendant, the Old Nick Williams Company, in violation of law, or that it, the said company, was guilty of the offense charged in the first count in the bill of indictment, because the liquor thus sold might have been purchased from persons other than those shown by the wholesale or rectifying books of the Old Nick Williams Company for use in its business as a retail liquor dealer.

XXIII.

(356)

The court erred in refusing to give to the jury the following special instruction tendered by the defendant, to-wit:

"183. All the counts in the bill of indictment charge that all the various offences were committed jointly by the defendants. It is necessary that the prosecution should prove to the satisfaction of the jury and beyond a reasonable doubt that such offenses were so jointly committed, as charged, before they can convict the defendants on any of them. Therefore, even should the jury find that the offenses charged were committed by one or two of them, but that the other defendants did not participate or join in the commission of the offense, the jury will acquit all the defendants."

upon the ground that it was necessary in this case that the prosecution should prove to the satisfaction of the jury and beyond a reasonable doubt that the offenses charged in the first count in the bill of indictment was jointly committed by the said defendant and the other defendants named in said bill, N. Glenn Williams and D. E. Kennedy, the allegation being that the act charged in the first count in the bill of indictment was jointly committed by each of the defendants, the jury could not convict the defendant, Old Nick Williams Company, unless it should become fully satisfied from the evidence beyond a reasonable doubt that the act was committed as charged; that is, that the act was so jointly committed by said defendants.

XXIV.

The court erred in refusing to give to the jury the following special instruction tendered by the defendant, to-wit:

"184. There is no evidence in the case that the offenses charged in the bill were jointly committed by the defendants. The jury will, therefore, return a general verdict of not guilty."

upon the ground that the evidence failed to disclose that the offenses charged in the bill were jointly committed by the defendants; besides, the jury found N. Glenn Williams and D. E. Kennedy, the other defendants, not guilty, thus negativing the fact that there was a joint offense.

XXV.

The court erred in not granting the motion of the defendant, Old Nick Williams, in arrest of judgment, upon the grounds stated in bills of exceptions.

XXVI.

The court erred in that it did not grant the motion of the defendant, Old Nick Williams Company, for a new trial of this case because of the errors alleged and set forth in the bills of exceptions herein.

Wherefore, the defendant below, plaintiff in error in the Circuit Court of Appeals, Old Nick Williams Company, prays that the judgment of said District Court may be reversed.

BURWELL & CANSLER,
THOMAS SETTLE,
J. E. ALEXANDER,
W. P. BYNUM, JR.,
MOORE & ROLLINS,
Attorneys for Old Nick Williams Co.

Endorsed:

Filed in this office Sept. 13, 1906.

SAM'L L. TROGDON, Clerk.

BOND.

(358) Know all men by these presents, that we, The Old Nick Williams Company, a corporation, as principal, and N. Glenn Williams, as sureties, are held and firmly bound unto the United States, in the full and just sum of two hundred and fifty dollars to be paid to the said United States, certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 15th day of April, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas, lately at a term of the United States District Court for the Western District of North Carolina, at Greensboro, in a suit depending in said court, between the United States, a judgment was rendered against the said the Old Nick Williams Company, and the said The Old Nick Williams Company, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The United States, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond, on the 15th day of May, 1906,

Now, the condition of the above obligation is such, that if the said The Old Nick Williams Company, a corporation, shall prosecute said writ of error to effect, and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE OLD NICK WILLIAMS CO., [Seal]

By N. GLENN WILLIAMS, Pres. [Seal]

N. GLENN WILLIAMS, [Seal]

Sealed and delivered in presence of—

Approved by—

JAS. E. BOYD,
U. S. Judge.

Endorsed:

Filed in this office Octo. 29th, 1906, as of April 15th, 1906.

SAM'L L. TROGDON, Clerk.

ORDER ALLOWING WRIT OF ERROR.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA. FOURTH CIRCUIT, AT GREENSBORO.

United States of America
vs.
Old Nick Williams Company.

ORDER ALLOWING WRIT OF ERROR.

(359) This the 12th day of September, 1906, came the defendant, Old Nick Williams Company, by its attorneys, and filed herein and presented to the court its petition praying for the allowance of a writ of error and its assignments of error intended to be urged by it; praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fourth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

In consideration whereof the court doth allow the writ of error without requiring of the defendant bond for its appearance or to stay execution upon said judgment.

And it is further ordered that the writ of error now allowed shall operate as a supersedeas and stay of execution or other proceeding upon the judgment rendered herein, and that the same and the citation when issued herein bear date April 15th, 1906, as heretofore ordered by the court.

JAS. E. BOYD,
United States Judge.

WRIT OF ERROR.

UNITED STATES OF AMERICA, } *ss:*
(360)

The President of the United States to the Honorable the Judge of the District Court of the United States for the Western District of North Carolina—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between the United States of America, plaintiff, and Old Nick Williams Company, defendant, a manifest error hath happened, to the great damage of the said Old Nick Williams Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the par-

ties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Fourth Circuit, together with this writ, so that you have the same at Richmond, on the fifteenth day of May, 1906, next in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of our Supreme Court, the fifteenth day of April, in the year of our Lord one thousand nine hundred and six.

(Seal of Court)

SAM'L. L. TROGDON,
Clerk of the District Court of the United States.

This writ is signed on Sept. 12th, 1906, as of Apr. 15th, 1906.

SAM'L L. TROGDON, Clerk.

Allowed by me Sept. 12th, 1906, to have affect as of April 15th, 1906.

JAS F BOYD,
U. S. Judge.

CITATION.

UNITED STATES OF AMERICA, } *ss:*
(361)

The President of the United States to United States of America and A. E. Holton, United States District for the Western District of North Carolina—Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond on the fifteenth day of May, 1906, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of North Carolina, at Greensboro, wherein Old Nick Williams Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James E. Boyd, Judge of the District Court of the United States this fifteenth day of April, in the year of our Lord one thousand nine hundred and six. This monition is signed Sept. 12th, 1906, but to have effect as of April 15th, 1906, is made now for then.

JAS. E. BOYD,
U. S. Judge.

Service of the within citation acknowledged and accepted without waiving any rights of the government and only waiving service by the marshal.
This 12 September, 1906.

A. E. HOLTON,
U. S. Attorney.

ORDER TO TRANSMIT RECORD.

UNITED STATES OF AMERICA, WESTERN DISTRICT OF NORTH CAROLINA, IN THE DISTRICT COURT, AT GREENSBORO.

(362) And thereupon it is ordered by the court here, that a Transcript of the Record and proceedings in the cause aforesaid together with all things thereunto relating except certain matters omitted under instructions from attorneys for plaintiff in error, be transmitted to the said United States Circuit Court of Appeals for the Fourth Circuit; and the same is transmitted accordingly.

[Seal of Court] Test: SAM'L L. TROGDON, Clerk.

CLERK'S CERTIFICATE.

(363) I, S. L. Trogdon, Clerk of the District Court of the United States for the Western District of North Carolina, at Greensboro, in said District, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of the United States vs. The Old Nick Williams Company, incorporated, except certain matters omitted under instructions from attorneys for plaintiff in error, as fully appears from the original papers and records in this office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at office in City of Greensboro, in said district, on this the 31st day of Octo., A. D., 1906.

(Seal of Court)

SAM'L L. TROGDON,
Clerk of the District Court.

Proceedings in the United States Circuit Court of Appeals for t
Fourth Circuit.

No. 709.

THE OLD NICK WILLIAMS COMPANY, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error.

Filed June 26, 1906.

UNITED STATES OF AMERICA:

In the Circuit Court of Appeals, Fourth Circuit.

OLD NICK WILLIAMS COMPANY, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Order Enlarging Time for Docketing Case in United States Circu
Court of Appeals.

For good cause shown, the undersigned judge, who signed th citation herein, does hereby enlarge and extend the time for docke ing and filing the record in this above entitled case in the Unite States Circuit Court of Appeals until the 1st day of September, 190 This June 26th, 1906.

JAS. E. BOYD,
U. S. Judge.

Order Enlarging Time to File Record.

Filed Aug. 23, 1906.

United States Circuit Court of Appeals, Fourth Circuit.

OLD NICK WILLIAMS COMPANY, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Order.

For good cause shown to the undersigned, it is hereby ordere that the time for docketing the case above entitled and filing the record thereof with the clerk of this court be and the same is now hereby enlarged and extended until October first, A. D., 1906.

J. C. PRITCHARD,
Circuit Judge.

Aug. 23d, 1906.

Order Enlarging Time to File Record.

Filed Sept. 29, 1906.

United States Circuit Court of Appeals, Fourth Circuit.

OLD NICK WILLIAMS COMPANY, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Order.

For good cause shown to the undersigned, it is now ordered that the time for filing and docketing the record in the above entitled case in the Circuit Court of Appeals, Fourth Circuit, at Richmond, be enlarged and extended until October 15, 1906.

The Clerk will file this order.

J. C. PRITCHARD.

This September 29, 1906.

Order Enlarging Time to File Record.

Filed Oct. 12, 1906.

United States Circuit Court of Appeals, Fourth Circuit.

OLD NICK WILLIAMS COMPANY, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Order Enlarging Time.

For good cause shown the undersigned, it is hereby ordered that the time be enlarged and extended to docket this case and file the record thereof in this court until the 3rd day of November, 1906, including that day. This the 12th day of October, 1906.

J. C. PRITCHARD.

And on another day, to-wit: November 1, 1906, the transcript of record is filed, and the cause docketed.

Same day, appearance of Charles A. Moore, E. T. Cansler, W. P. Bynum, Jr., and J. E. Alexander, for the plaintiff in error, order filed.

Same day, appearance of Hon. A. E. Holton, United States Attorney, for the defendant in error, order filed.

Stipulation to Continue.

Filed Nov. 12, 1906.

In the United States Circuit Court of Appeals, Fourth Circuit, a Richmond.

November Term, 1906.

OLD NICK WILLIAMS COMPANY, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

Stipulation.

It is agreed that this case be and the same is here continued fo this term of the court. This agreement is made without prejudic to the right of the defendant in error to move at the next term a of this term to dismiss the writ of error or appeal of the plaintif in error: said motion to dismiss, if made at said next term, to b taken and deemed in every respect, if made at the next term, a if made at this term, and without prejudice to the defendant in erro

This the 9th day of November, 1906.

BURWELL & CANSLER,
BYNUM, MOORE & ROLLINS,
Attorneys for Old Nick Williams Company, Plaintiff in Error.
A. E. HOLTON, *U. S. Attorney.*

And on the same day, to-wit: Nov. 12, 1906, the cause is continued Jan. 5, 1907, twenty copies of the printed record is filed.

Motion of Defendant in Error to Dismiss Writ of Error.

Filed Jan. 30, 1907.

In the United States Circuit Court of Appeals, Fourth Circuit.

February Term, 1907.

THE OLD NICK WILLIAMS COMPANY, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error.

The United States, the defendant in error, through its representa tive, A. E. Holton, U. S. Attorney for the Western District of North Carolina, moves to dismiss the plaintiff's writ of error upon th grounds:

1st. For that the writ of error was not issued within six month after the entry of the judgment of the court sought to be reviewed

the judgment having been entered November 28, 1905, (see page 17 of the Record), and the writ of error was not issued by the court until September 12, 1906, (see record, page 260).

2nd. For that the District Judge had no power to extend the time for issuing the writ of error. (For order extending time see Record, page 20.)

Therefore the defendant in error, the United States, prays the court to dismiss plaintiff's writ of error.

A. E. HOLTON,
Attorney for the United States, Defendant in Error.

Answer to Motion to Dismiss Writ of Error.

Filed Feb. 9, 1907.

United States Circuit Court of Appeals, Fourth Circuit.

No. 709.

OLD NICK WILLIAMS COMPANY, Plaintiff in Error,
versus
UNITED STATES OF AMERICA, Defendant in Error.

In Error to the District Court of the United States for the Western District of North Carolina, at Greensboro.

Answer to Motion to Dismiss Writ of Error and Brief in Support of the Same.

Burwell & Cansler, Wm. P. Bynum, Jr., Thos. Settle, A. E. Alexander, Moore & Rollins, Attorneys for Plaintiff in Error.

Filed Feb. 9, 1907.

HENRY T. MELONEY, *Clerk.*

In the United States Circuit Court of Appeals, Fourth Circuit, February Term, 1907.

OLD NICK WILLIAMS COMPANY, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Answer to Motion to Dismiss Writ of Error and Brief in Support of the Same.

The plaintiff in error, answering the motion of the defendant in error to dismiss the writ of error herein, respectfully represents to the Court:

That on the 16th day of June, 1905, the bill of indictment herein was returned by the grand jury in the District Court of the United States for the Western District of North Carolina at Charlotte, against the plaintiff in error, charging it with the offences named

therein: that thereafter by an order duly entered by the Court in the cause, the same was transferred for trial to the next term to be held in said District at Greensboro in said State; and at said next term of said Court held at Greensboro was postponed to be heard at an adjournment of said term to be held at Greensboro on the 23d day of October, 1905, when and where the said case was duly tried by the Court and a jury as appears in the record; at which trial the plaintiff in error, Old Nick Williams Company, was convicted upon the first count contained in said bill of indictment, and acquitted on all other counts contained in said bill.

Whereupon the plaintiff in error duly moved to set aside the verdict, in arrest of the judgment and for a new trial because of various exceptions to the rulings of the Court upon the trial, as well as upon other grounds; but the Court overruled the motions of the petitioner, and on November 28, 1905, adjudged that the plaintiff in error pay a fine of five thousand dollars and the costs of the case; to which judgment the plaintiff in error, after objection in open court, duly excepted, and prayed for a bill of exceptions, and obtained leave of the Court to file in due form said bill of exceptions, as hereinafter stated.

Whereupon, in open Court, and before the adjournment thereof, it was by consent of the parties, the United States district attorney representing the *plaintiff* in error and the counsel representing the plaintiff in error, duly ordered by the Court:

That, "the defendant's counsel to have ninety days to prepare and serve bill of exceptions. District attorney allowed thirty days after the preparation and serving of the defendant's bill of exceptions to prepare his exceptions thereto, *after which his Honor will settle the bill of exceptions upon ten days' notice to the attorneys of the parties, and when said bill of exceptions is filed they may be deemed, as made in apt time.*" This order was entered on the minutes.

That thereafter from time to time it was agreed between the parties, the United States district attorney represen-ing the United States, and the attorneys above referred to, representing the plaintiff in error, that the time for the preparation and filing and serving of said bill of exceptions should be extended until the 15th day of April, 1906; upon said agreements orders of the Court were made extending the time for such preparation, filing and service of said bill of exceptions.

That the plaintiff in error did in due and apt time, and on the 14th day of April, 1906, and within the time extended, as aforesaid, duly prepare, file and serve said bill of exceptions as allowed by said Court; and on the 12th day of May, 1906, the United States district attorney duly prepared, filed and served his objections and amendments thereto and within the time provided by said order.

That thereafter, before the expiration of six months from the date of the entry of said judgment against the plaintiff in error by said Court, and on or about the 17th day of May, 1906, counsel for the plaintiff in error appeared before his Honor, James E. Boyd, United States Judge, who tried the case, and requested him to fix a time and

place when he would settle and sign the bill of exceptions. At this time said judge was holding a term of said Court at Asheville in said District, and was, on that account, unable to settle said bill of exceptions at that time, but stated that he would fix the time and place for the settlement and signing of the same, and would notify the District Attorney and counsel representing the plaintiff in error accordingly. Almost at once, or within a very short time after counsel had made such request of his Honor, Judge Boyd, they notified the United States district attorney of such request being made of said judge, and of his answer thereto; to which said district attorney made no objection but assented, expressing his willingness that said judge fix said time and place to settle and sign said bill of exceptions.

That his Honor, the said judge, being at that time, and almost continuously thereafter, engaged in the discharge of his official duties, either as a member of the Circuit Court of Appeals or in holding the Circuit and District Courts in his District, was unable to settle and sign the bill of exceptions until after the expiration of six months from the date of the entry of the judgment against the plaintiff in error, and did not give the notice required by said order to the parties or their attorneys fixing time and place for settling the bill of exceptions until after the expiration of six months from the entry of said judgment.

That, as the plaintiff in error is advised, and is informed and believes, it is required by law and the rules of the Supreme Court of the United States and of this honorable court, that, when filing a petition for a writ of error it is necessary to file also an assignment of errors accompanying the same setting forth with particularity the errors alleged and relied upon as shown by its bill of exceptions, without which "no writ of error or appeal shall be allowed;" and because said bill of exceptions had not been settled and signed by his Honor, the plaintiff in error was unable to and it did not prepare or file said assignment of errors within six months from the date of the entry of the judgment against it; hence, without fault on its part or on the part of its attorneys, it was unable to procure a writ of error transferring this case into the Circuit Court of Appeals within six months from the date of the entry of judgment against it.

That the plaintiff in error, its agents, officers and attorneys, did, at all times, after the rendition of the said judgment, exercise due diligence in preparing said bill of exceptions and in doing all other things required or proper to be done by it or them looking to the settlement and signing of said bill of exceptions by the judge, the filing of said assignments of error and the suing out the writ of error from this Court within six months from the date of the entry of said judgment rendered by the District Court against it, that the same might be reviewed by this Court.

That almost immediately thereafter, but after six months had elapsed from the entry of said judgment against it, the plaintiff in error again made application to his Honor, James E. Boyd, U. S. District Judge, to settle the bills of exception in the case that it might

properly petition the Court for the allowance of the writ of error directing the transfer of the record and proceedings herein to the Circuit Court of Appeals for the purpose of having said judgment reviewed and reversed. His Honor, the said District Judge, being in doubt as to his power at this time to settle the bill of exceptions, without being directed to do so by this honorable Court in some proper proceeding instituted in this Court for that purpose, did not settle the bills of exceptions; whereupon, the plaintiff in error, for the purpose of procuring the settlement of said bills of exceptions and the writ of error herein, made petition to this honorable Court on or about the — day of July, 1906, stating fully the facts hereinbefore stated and prayed that "a writ issue from this honorable Court requesting his Honor, James E. Boyd, U. S. District Judge, to settle the bills of exceptions tendered by your petitioner (plaintiff in error), according to the truth of the matters which took place before him on the trial of the aforesaid cause, and when so settled to sign the same as of the 15th day of April, 1906, that being the day when the proposed bills of exceptions was filed under the order of Court, and that your petitioner be thereafter permitted to file its petition for writ of error accompanied by its assignments of error, and that said writ of error issue as of that date."

That said petition was duly filed in this Court and duly docketed upon the records of the same, and has since then continually pended, and is still pending herein. (Plaintiff in error specially refers to said petition and prays that the same be taken as a part of this answer to the motion of the defendant in error to dismiss.)

That thereafter, on the 27th day of July, 1906, his Honor, James E. Boyd, U. S. District Judge, duly made and entered in said cause an order in the words and figures as follows:

UNITED STATES OF AMERICA
vs.
OLD NICK WILLIAMS COMPANY.

It appearing to the Court that the defendant, Old Nick Williams Company, has filed with the clerk of this Court within the time required by the order of the Court its bill of exceptions, to which, within the time required by the order of the Court, the United States district attorney filed certain objections and amendments, and that the bill of exceptions has not been settled, signed and sealed by the Court within six months from the date of the entry of judgment herein, and the Court being of opinion that the defendant, Old Nick Williams Company, is entitled, under the circumstances, to have said bill of exceptions settled and a writ of error and citation issued and served *nunc pro tunc* and as within the time required by law, to procure a review of the judgment of the Court pronounced against it.

It is now ordered that the parties or their attorneys appear before the undersigned at his chambers at Greensboro, N. C., on the (7th) seventh day of August, 1906, when and where said bill of exceptions will be settled, signed and sealed by the Court.

It is further ordered that when said bill of exceptions shall have

been so settled, signed and sealed by the Court, that, after petition for writ of error and assignments of error shall have been filed by the defendant, a writ of error and citation in due form be issued and served, all of which shall bear date as of the 15th day of April, 1906, said date being the date on which said defendant filed its proposed bill of exceptions with the clerk herein and within the period of six months from the date of the entry of the judgment herein aforesaid.

This the 27th day of July, 1906.

JAS. E. BOYD,
U. S. Judge.

and directed the clerk of said Court to issue notice of the same to the United States district attorney and to the attorneys of record of Old Nick Williams Co. (See p. 20 of the printed record).

That thereafter, after due notice to the U. S. district attorney and the attorneys for the plaintiff in error, his Honor, the said District Judge, settled, allowed, signed and sealed the bills of exception herein and duly filed the same in the office of the clerk of the said District Court (pp. 86 to 253, inclusive, of the printed record); whereupon the plaintiff in error did forthwith duly make and file petition, accompanied by its assignments of error, praying "that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Fourth Circuit for the correction of errors so complained of and that a transcript of the record, proceedings and papers in this cause duly authenticated, may be sent to the said Circuit Court of Appeals" (printed record, pp. 253 to 257, inclusive), at the same time making and filing in said Court a good and sufficient bond for the prosecution of the writ of error to effect and to answer all damages and costs if it fail to make its plea good, which said bond was duly approved by said District Judge.

That upon the filing of said petition, assignments of error and bond, his Honor, the said District Judge, duly allowed the writ of error, which was duly issued and was dated as of April 15, 1906, in accordance with the order of said Court theretofore made; and in obedience to said writ of error, "the record and proceedings aforesaid, with all other things concerning the same," were duly certified to this Circuit Court of Appeals that it "may cause further to be done therein to correct the error, what of right, and according to the laws and custom of the United States should be done."

Wherefore, the plaintiff in error prays the Court that said motion to dismiss the writ herein be refused and disallowed.

This the — day of February, 1907.

_____.
_____.
_____.
_____.
_____.

Attorneys for Old Nick Williams Company,
Plaintiff in Error.

NORTH CAROLINA,
——— *County:*

N. Glenn Williams, being first duly sworn, says that he is an officer, to-wit: president and general manager of Old Nick Williams Company; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to such matters and things as are therein stated on information and belief, and as to such matters and things he believes it to be true.

——— ———.

Sworn to and subscribed before me this the — day of ———, 1907.

———— ————,
Notary Public in and for the County of —,
North Carolina.

Brief for Plaintiff in Error on Motion to Dismiss.

Statement.

During the term at which Old Nick Williams Company, plaintiff in error, was convicted, and at which the judgment of the Court upon such conviction was entered, to-wit: at the October-November, 1905, adjourned term at Greensboro, an order was entered of record, by consent, giving the plaintiff in error ninety days in which to prepare and file with the clerk of said Court bills of exception, and giving to the Government, defendant in error, thirty days thereafter in which to file objections and amendments thereto, after which *the judge was to settle the bill of exceptions upon giving ten days notice to counsel representing both sides.*

It was also by consent ordered that *when the bills of exceptions should be settled that they should be taken and deemed as if filed in apt time;* that is, *as if settled and signed during the term of the Court at which the trial was had.*

There was no order entered adjourning the term at which the trial was had.

Before the expiration of the ninety days allowed to the defendant below to prepare, serve and file its bill of exceptions, the time was extended, by consent of the parties, until April 15, 1906. On the 14th day of April, 1906, the defendant duly filed and served its bill of exceptions, as required by the order of the Court, and the district attorney, within the time given to him by the order, duly filed objections, exceptions and amendments thereto.

Counsel of defendant below made request of his Honor, James E. Boyd, District Judge, on or about the 7th day of May, 1906, to fix a time and place for the settling of the bill of exceptions, but at that time the said judge was constantly engaged in the discharge of his official duties, and, on this account, could not then fix such time and place or settle the bill of exceptions. And this condition of affairs continued until the expiration of six months from the date of the entry of the judgment against the plaintiff in error.

Afterwards plaintiff in error filed in this Court a petition for a mandamus for the purpose of having the District Judge directed to allow, sign and seal the bills of exceptions, which is yet pending in this Court. During the pendency of this petition the District Judge allowed the bills of exceptions and the case is now here on writ of error.

Argument.

By the act of Congress, approved March 3, 1891, "the plaintiff in error or appellant shall file with the clerk of the Court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. *No writ of error or appeal shall be allowed until such assignment of error shall have been filed.*"

This language is incorporated into Rule 35 of the Supreme Court of the United States, and into Rule 11 of the Circuit Court of Appeals.

The defendant below could not, therefore, prior to the expiration of six months from the entry of the judgment against it have filed its petition for the writ of error, because it could not have filed an assignment of errors. And if it had attempted to do so the judge could not have allowed the writ without assignments of error had been filed with such petition, setting out separately and particularly each error asserted and intended to be urged.

The defendant below, plaintiff in error here, could not, of course, have filed such assignments of error until the bill of exceptions was settled.

> 2 Foster's Federal Practice, 3d Edition, Section 507, page 1231.

Generally, it is required that the bill of exceptions should be settled and signed during the trial term, but this time may be enlarged by an order of the Court made during the term, or by consent.

> 2 Foster's Federal Practice, Section 377, pages 888, 889 and 890.

It is said that "It is the safer practice to date the bill of exceptions at a day within the time as originally limited, and to insert in the order a provision that the bill of exceptions be signed, sealed and filed *nunc pro tunc*."

"Originally, exceptions were required to be taken at the time the alleged erroneous ruling or decision was made, and the appeal must have been presented, settled, signed and sealed before verdict, or before the jury were discharged. But, to meet the convenience of Bench and Bar, the practice obtained of allowing the appeal to be reduced to form after the judgment; the appeal in such cases being signed *nunc pro tunc*." 3 Cyc. 37.

"Generally, it may be said that a bill of exceptions should be settled during the term of the Court at which the trial was had and judgment rendered, unless by consent or agreement of the respective parties, special order of the Court, or under the provisions of a statute, the time is extended." 3 Cyc., 38.

"Under modern practice the exceptions must be noted when taken but leave may be given to reduce them to writing and tender them for signature after the trial."

3 Ency. Reading and Prac. 463, *citing*:
Walton *v.* U. S., 9 Wheat. 651;
Brown *v.* Clark, 4 How., 4;
Sweet v. Perkins, 24 Fed., 777;
French *v.* Edwards, 13 Wall., 506;
U. S. *v.* Carey, 110 U. S., 51;
Hunnicutt *v.* Peyton, 102 U. S., 354;
Stanton *v.* Embry, 93 U. S., 564, and many other cases both State and Federal.

"This bill should in such cases be signed *nunc pro tunc*, so as to purport to be actually in form and signed during the trial." 3 Ency. P. & P., 464.

In the case of Hunnicutt *v.* Peyton, *supra*, the Court said: "But when an exception has been taken at the trial and noted, reducing the exception to form afterwards and attesting it is not making a new case. It is merely verifying the case as it appeared on the trial."

The Court had the right to extend the time for settling bill of exceptions.

In the case of Ward *v.* Cochran, 150 U. S., 601, the Court said: "As this record discloses that the exceptions relied on were taken at the trial, and that the delay was in reliance on an express order of the Court, postponing the act of allowing and signing the bills, we think that we are not precluded from a consideration of the errors assigned."

The six months within which the writ of error should have been sued out, having elapsed since the entry of the judgment against the defendant below without the writ of error having been issued, the plaintiff in error has lost its right to have the writ of error issued, unless such right is saved to it by reason of the facts shown in its petition filed herein. Certainly, the defendant below was not at fault. In fact, no one was at fault. The condition of affairs below, and in the District where the case was tried, was such that the bill of exceptions could not be settled, as provided by the terms of the order made by consent in the case. It will not be denied that the official duties of the judge who tried the case, during the period provided for the settlement of the bill of exceptions, required of him the most constant and laborious attention. Nor will it be insisted that the defendant below did not fully comply, in every respect, with the order of the Court. The fault rests upon facts and circumstances for whom no one connected with the case is responsible. The defendant below in no particular was to blame.

"When a bill of exceptions is presented to the trial judge within the time prescribed, the rights of appellant or plaintiff in error will not be prejudiced by the judge's delay in signing it. In such case the maxim *actus curiae neminem gravabit* applies." 2 Cyc., 41 (See note 16 citing numerous cases).

And it is well settled that in case of necessity "the power of an

appellate court in aid of its appellate jurisdiction to compel a trial judge to sign a bill of exceptions is well established." 3 Cyc., page 47.

19 Am. & Eng. Ency. of Law, 2d Edition, page 844. Note 4.
Ex parte Bradstreet, 4 Peters 102, Law Edition, Book 7, page 796;
Scaife *vs.* Land Company 87 Fed. Rep., 308, 30 C. C. A., 664;
3 Ency. P. & P. 488, 489, 490;
3 Cyc., 49; note 36.

"Mandamus will lie to compel judicial officers to act and exercise their judgment and discretion, or to perform mere ministerial duties imposed upon them by law."

19 Am. & Eng. Ency. L. (2 Ed.) 744 and authorities cited.

The Court will in all cases grant the writ if under the established rules of law the person applying for it is entitled to it. "Indeed, many cases go so far as to call the writ a writ of right or in the nature of a writ of right."

19 Am. & Eng. Ency. L. (2 Ed.) 751-2-3 and notes 1 and 2.

"But the right to the writ and the prerogative power to issue it, has ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable. It was so held by this Court in the cases of *Kendall v. United States*, 12 *Pet.*, 615; *Kendall v. Stokes*, 3 *How.* 100."

Ex Parte Kentucky v. Dennison, 24 *How.*, 66;
19 Am. & Eng. Ency. L. (2 Ed.) 781, *citing*
Hartman *v.* Greenhow, 102 U. S., 675;
Union Pac. *v.* Hall, 91 U. S., 343;
Riggs *v.* County, 6 Wall, 166;
Kendall *v.* U. S., 12 Pet. 524;
Kendall *v.* Stokes, 3 How., 100;
People *v.* R. R. Co., 42 Fed., 638, and many cases from the State courts.

"Mandamus will lie to compel a judge to sign, settle or seal a bill of exceptions or statement of facts in a proper case."

19 Am. & Eng. Ency. L. (2 Ed.) 841; citing
Scaife *v.* Western N. C., &c., 87 Fed. Rep. 308, *Ex parte* Crane, 5 Pet. 190; and
Chateaugay Ore, etc. Co., Petitioner, 128 U. S., 544; also numerous cases from nearly all the States.

"But when the time for preparing a bill of exceptions has been extended by the trial judge, he may be compelled to settle or sign a bill if presented within the time as extended. So also, when the relator has done all in his power to perfect his right, it cannot be affected by the delay of the judge or adverse party."

19 Am. & Eng. Ency. L. (2 Ed.) 847.

Failure will be Excused When the Party is Not in Fault.

"Such failure will be excused and relief granted, however, when it is caused by the act of the adverse party or of the Court and there has been no default or negligence on the part of appellant or plaintiff in error." 3 Cyc., 62. Note 91.

"The effect, generally, of a failure on the part of appellant or plaintiff in error to have a case or statement of appeal settled in time is to prevent a review by the appellate court of any matters to a consideration of which a case or statement is necessary; but where the failure to settle is caused by no fault of appellant, or where he is misled by the adverse party, or where the failure is caused through a *bona fide* mistake it may be excused and relief granted." 3 Cyc., 66, Notes 4, 5, 6 and 7.

As to when *mandamus* will issue see

Ex parte Chateaugay, 128 U. S. 542;
Scaife *vs.* Land Company, *supra*.
3 Ency. Plead. and Prac., 188, *et seq.*

The case, *ex parte* Chateaugay, 128 U. S. 542, is a very important one and is, we think, decisive upon the question of the power of the Court to grand relief, as well as to when and under what circumstances relief should be granted.

E. T. CANSLER,
W. P. BYNUM, JR.,
THOS. SETTLE,
J. E. ALEXANDER,
MOORE & ROLLINS,
Attorneys for Old Nick Williams Company, Petitioner.

Feb. 11, 1907. (Feb. Term, 1907.) cause came on to be heard on motion to dismiss and on the merits before Circuit Judge Pritchard, and District Judges Morris and Dayton, and is argued by counsel and submitted.

And on another day, to-wit, April 9, 1907, motion is made in open court by plaintiff in error for further argument.

And on the same day, to-wit, April 9, 1907, the court made and entered the following order, to-wit:

Order Denying Further Argument.

Filed April 9, 1907.

United States Circuit Court of Appeals, Fourth Circuit.

No. 709.

THE OLD NICK WILLIAMS COMPANY, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error.

Now comes Charles A. Moore, attorney for the plaintiff in error, and moves the court in open court to hear further argument in this cause.

Upon consideration of the matter the court here denies the motion.

NATHAN GOFF,
Circuit Judge Presiding.

April 9, 1907.

April 10, 1907, (Feb. Term, 1907,) the court announced and filed its opinion, which is as follows, to-wit:

Opinion.

Filed April 10, 1907.

United States Circuit Court of Appeals, Fourth Circuit.

No. 709.

THE OLD NICK WILLIAMS COMPANY, Plaintiff in Error,
versus
THE UNITED STATES, Defendant in Error.

In error to the District Court of the United States for the Western District of North Carolina, at Greensboro.

[Argued Feb. 11, 1907; Decided April 10, 1907.]

Before Pritchard, Circuit Judge, and Morris and Dayton, District Judges.

Charles A. Moore and William P. Bynum, Jr., (E. T. Cansler, Thomas Settle and J. E. Alexander on the brief) for the plaintiff in error; and A. E. Holton, U. S. Attorney, for the defendant in error.

Motion to Dismiss

MORRIS, *District Judge:*

This is a motion to dismiss the writ of error because not sued out within six months after the entry of the judgment.

It arises in the case of an indictment against the Old Nick Williams Company, a corporation which was authorized to carry on the

business of a rectifier, and which by the verdict of a jury was convicted of violating the second paragraph of Section 3247 of the Revised Statutes, being found guilty of carrying on the business of a rectifier with intent to defraud the United States of the tax on the spirits rectified by it.

On November 28, 1905, the jury rendered its verdict and on the same day the defendant moved in arrest of judgment, which motion was overruled. The defendant then moved to set aside the verdict and for a new trial, which motion was also overruled. The Attorney for the United States then prayed the judgment of the court, and on the same day, November 28, 1905, the court entered its judgment by which it sentenced the defendant to pay a fine of $5,000.00 and be taxed with the costs.

It thus appears from the record that the judgment was entered November 28, 1905. On the same day it was ordered that the defendant have 90 days to prepare its bill of exceptions and that the Attorney for the United States have 30 days after being served with the defendant's bill of exceptions to prepare any objections thereto and that the court would settle the bill of exceptions upon 10 days' notice to the attorneys of the parties and when filed the bill of exceptions should be deemed as made in apt time. Afterwards, January 17, 1906, by consent of the parties, the court by its order further extended the time for preparing and filing the defendant's bill of exceptions to March 15, 1906, and afterwards, in like manner, the time was extended to April 1st, 1906. On July 27, 1906, the court over the objection and protest of the Attorney for the United States made an order which recited that the defendant had filed with the clerk its bill of exceptions to which the Attorney for the United States had filed certain objections and proposed amendments, so that the bill of exceptions had not been settled and signed by the court within six months from the date of the entry of the judgment, and the court being of opinion that the defendant was entitled under the circumstances to have the bill of exceptions settled and a writ of error and citation issued and served *nunc pro tunc* as within the time required by law to procure a review of the judgment, the said order of the court directed that the attorneys should appear before him at Greensboro on August 7, 1906, to have the bill of exceptions settled and signed by the court, and further ordered that when the bill of exceptions was settled and signed and after a petition for a writ of error and assignments of error had been filed by the defendant, a writ of error and citation in due form should be issued and served, all to bear date as of the 15th April, 1906, said date being the date on which the defendant filed its proposed bill of exceptions with the clerk and which was within six months from the entry of the judgment.

Thereafter, on September 12, 1906, the defendant having presented its petition for the allowance of the writ of error and its assignment of errors, the court signed an order allowing the writ of error and directed that the writ of error and citation when issued bear date April 15th, 1906, as theretofore ordered by the court.

Thereupon the writ of error was issued on September 12, 1906, as of April 15th, 1905, as ordered by the trial judge.

The Attorney for the United States now moves to dismiss the writ of error because not sued out within six months after the entry of the judgment.

The statute restricting the time for writs of error in such cases is Section 11 of the Act of Congress of March 3, 1891, and reads:

"SEC. 11. That no appeal or writ of error by which any order, judgment or decree may be reviewed in the Circuit Court of Appeals, under the provisions of this act, shall be taken or sued out except within six months after the entry of the order, judgment or decree sought to be reviewed."

It has been so frequently and so uniformly decided that the limit of time after the entry of the judgment for the issuing of writs of error admits of no extension that the rule is now firmly established.

In *Brooks vs. Norris*, 11 Howard, 204, the Supreme Court said: "The writ of error is not brought in the legal meaning of the term until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court and the period of limitation prescribed by the Act of Congress must be calculated accordingly. The day on which the writ may have been issued by the clerk or the day on which it is tested are not material in deciding the question."

In *Polleys vs. Black River Co.*, 113 U. S., 81, it was held that the plaintiff in error had a right to his writ on the day the judgment was entered and on that day the time within which his right existed began to run.

Scarborough vs. Pargoud, 108 U. S., 567;
U. S. vs. Baxter, 54 Fed. Reporter, 624;
Stevens vs. Clark, 62 Fed. Reporter, 324.

In *Credit Co. vs. Ark. Cent. Rway.* 128 U. S., 258-264, it was held that although the appeal had been allowed and the bond for costs approved and the citation signed by a Supreme Court Justice within the time prescribed by law, yet, because the papers were not filed with the clerk until five days after the time expired, the appeal was too late. The court said: "The attempt made in this case to anticipate the actual time of presenting and filing the appeal by entering an order *nunc pro tunc*, does not help the case. When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be the law which limits the time within which an appeal can be taken would be a dead letter."

In *Farrar vs. Churchill*, 135 U. S., 609, it was held that a cross-appeal in equity like other appeals must be entered within the time limited, calculating from the date of the decree, and because in that case the petition, order and bond were not filed in the Circuit Court until after the lapse of two years from the entry of the decree, the cross appeal was dismissed. It was held in the same case that the failure to file an assignment of errors although required by the act

of Congress and the rule of court was not jurisdictional and might be waived.

City of Waxahachie vs. Coler, 92 Federal Reporter, 284;
City of Wilmington vs. Ricaud, 92 Federal Reporter, 212;
Threadgill vs. Platt (Circuit Judge Simonton), 71 Federal Reporter, 1.

In the present case reliance is placed by the plaintiff in error upon the alleged fact that the delay in settling the bill of exceptions was not the fault of the plaintiff in error but was attributable to the judicial engagements of the trial judge, and it is argued that until the bill of exceptions was settled counsel for the plaintiff in error could not intelligently prepare the assignment of errors which should accompany the petition for a writ of error. (Revised Statutes, section 997.) But it is not a fact that the assignment of errors requires the previous settlement of the bill of exceptions. The exceptions are noted during the progress of the trial and are known to the counsel for the plaintiff in error and this notation is in fact the basis upon which the bills of exceptions are prepared. The assignment of errors can be formulated before the settling at length of the formal bills of exception.

It does not follow because the Revised Statutes, section 997, provides that there shall be annexed to and returned with the writ of error an assignment of errors that the bill of exceptions must be first settled. The bill of exceptions must be settled as provided for by the rules and practice of the court, or the time may be enlarged by orders of court specially entered in particular cases.

In the case of *Waldron vs. Waldron* 156 U. S., 361, the judgment was entered July 10, 1890, and the writ of error was dated July 15, 1890, but the bill of exceptions by consent of the parties was not settled during the term, and because of subsequent delays was not settled until February, 1891, yet the Supreme Court held it to be in time because done by an agreement of the parties made during the term.

But this is not so with regard to writs of error. The writ of error is the writ of the appellate court addressed to the judge of the trial court, directing him to send the record and proceedings in the case to the appellate court, and when deposited with the clerk of the trial court, it is served, but not before. After the writ is so filed, the time for complying with it may, by proper orders, be enlarged.

Mission vs. Cavazos, 6 Wall., 355.

"A writ of error is the process of this court and it is issued therefore only upon our authority."

Brown vs. McConnell, 124 U. S., 189-190.

In *School District vs. Hall*, 104 U. S., 428, it was held that a writ of error will not be dismissed as for want of jurisdiction by reason of a failure to return therewith an assignment of errors. The assignment of errors is not a jurisdictional requirement, although it is true that by Rule 11, errors not assigned, will be disregarded, still

the court may at its option notice a plain error not assigned or specified.

It appears to us that the delay in the present case in taking out the writ of error was not the act of the court, but of the plaintiff in error (*Sage vs. Central R. R. Co.*, 93 U. S., 412-417,) and in such a case a *nunc pro tunc* order cannot be made effectual.

The case of *Kingman vs. Western Mfg. Co.*, 170 U. S., 675, cited by the plaintiff in error, is merely to the effect that in a case where a motion for a new trial is pending, the limitation of time does not begin to run until the motion for new trial has been overruled, for the reason that until the court has acted on the motion for a new trial, filed in due time the judgment is not final but is still under the control of the trial court and not ripe for invoking the jurisdiction of the appellate court.

The case of *In re Chattanooga Ore and Iron Co.*, 128 U. S., 544, also cited by the plaintiff in error, treats only of the time within which a bill of exceptions may be properly settled and not of writs of error.

We feel ourselves reluctantly constrained to hold that we are without jurisdiction to examine the alleged errors, for the reason that the writ of error was not sued out within six months from the entry of the judgment.

Writ of error dismissed.

April 10, 1907. (Same Term), the court made and entered the following judgment, to-wit:

Judgment.

Filed April 10, 1907.

United States Circuit Court of Appeals, Fourth Circuit.

No. 709.

THE OLD NICK WILLIAMS COMPANY, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error.

In Error to the District Court of the United States for the Western District of North Carolina.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

NATHAN GOFF.

April 10, 1907.

And on another day, to-wit: April 19, 1907, the mandate of this court is stayed until June 1, 1907.

Petition for Re-hearing.

Presented May 4, 1907.

United States Circuit Court of Appeals, Fourth Circuit.

No. 709.

OLD NICK WILLIAMS COMPANY, Plaintiff in Error,
versus
UNITED STATES OF AMERICA, Defendant in Error.

In Error to the Circuit Court of the United States for the Western District of North Carolina.

Petition for Re-hearing.

Burwell & Cansler, W. P. Bynum, Jr., J. E. Alexander, Thomas Settle, Moore & Rollins, Attorneys for Plaintiffs in Error.

Presented May 4, 1907.

HENRY T. MELONEY, *Clerk.*

United States Circuit Court of Appeals, Fourth Circuit.

Petition to Re-hear.

OLD NICK WILLIAMS COMPANY, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Now comes Old Nick Williams Company and respectfully petitions the Court for a re-hearing of the above entitled cause, for that:

I.

There is error in the holding and ruling of the Court that "it is not a fact that the assignment of errors requires the previous settlement of the bill of exceptions. The exceptions are noted during the progress of the trial and are known to the counsel for the plaintiff in error and this notation is in fact the basis upon which the bills of exceptions are prepared. The assignment of errors can be formulated before the settlement at length of the formal bills of exception."

II.

The Court was inadvertent to the fact, which appears in the record, that the plaintiff in error, defendant below, had to rely upon his counsel to prepare the petition for writ of error and the assignment of errors and present the same to the Court for allowance, and that on this account the fault, if any, of the delay in procuring the writ of error and filing the assignment of errors until after six months

from the entry of the judgment, was entirely that of its counsel and not of itself, and on this account the laches, neglect and delay was, on the part of the plaintiff in error, excusable.

III.

Under the circumstances and the facts shown in the record, to-wit, that the plaintiff in error was not in itself at fault because of the delay in procuring the writ of error, but had done all that it could do to procure the writ, the statute of North Carolina, Section 513 of the Revisal of North Carolina, which is a statement of the general law upon the subject of mistake, inadvertence and excusable neglect, applied. This Section of the Revisal of North Carolina reads as follows:

"MISTAKE, SURPRISE, EXCUSABLE NEGLECT. The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding."

IV.

The Court was not advertent to the fact that the Court below had, after proceedings for mandamus to compel a settlement of the bills of exceptions had been instituted in this Court, adjudged on July 27, 1906, "That the defendant, Old Nick Williams Company, is entitled, under the circumstances, to have said bill of exceptions settled and a writ of error and citation issued and served *nunc pro tunc*, as within the time required by law to procure a review of the judgment of the court pronounced against it," after first finding the fact, as stated in the order, that the plaintiff in error "has filed with the clerk of this court within the time required by the order of the court, its bill of exceptions, to which, within the time required by the order of the court, the United States District Attorney filed certain objections and amendments."

V.

The Court was inadvertent to the facts alleged in the answer to the motion to dismiss, that about eleven days "before the expiration of the six months from the entry of the judgment against the plaintiff in error by said court, and on or about the 17th day of May, 1906, counsel for the plaintiff in error appeared before his Honor, James E. Boyd, U. S. Judge, who tried the case, and requested him to fix a time and place when he would settle and sign the bill of exceptions," and that at that time and in answer to such request the said judge stated "that he would fix the time and place for the settlement and signing of the same and would notify the District Attorney and counsel representing the plaintiff in error accordingly;" and that "almost at once, or within a very short time after counsel had made such request of his Honor, Judge Boyd, they notified the District Attorney of such request being made of said Judge and of his answer thereto, to which said District Attorney made no objection, but assented, expressing his willingness that said Judge fix such

time and place to settle said bill of exceptions." The plaintiff in error insists that, under these circumstances and upon these impliedly admitted facts, the prosecution is now estopped to move to dismiss the writ of error; that the natural and necessary effect of such agreement made and entered into by the District Attorney delaying the settlement of the bill of exceptions until after the expiration of six months from the entry of judgment, was to produce or at any rate to encourage the belief on the part of counsel for the plaintiff in error that time was not of the essence and that the petition for writ of error and assignment of errors might thereafter be filed, and the writ of error thereafter issued.

VI.

The plaintiff in error respectfully insists that this Court is not deprived of its jurisdiction of a cause brought to this Court by writ of error simply because the writ of error has not been issued within the period of six months prescribed by the statute, for, were this so, there are cases in which the most grievous injustice would be done, and the most salutary principles would become ineffectual.

VII.

It appears from the record that the plaintiff in error is without fault, and has done everything it could do to procure a review of the judgment below.

Wherefore, the plaintiff in error prays the Court for a re-hearing of the motion to dismiss, to the end that this Court may review the judgment of the court below rendered against it.

BURWELL & CANSLER,
W. P. BYNUM, JR.,
J. E. ALEXANDER,
THOMAS SETTLE,
MOORE & ROLLINS,
Attorneys for Plaintiff in Error.

(Certificate of counsel in due form on original.)

Certificate of Counsel.

United States Circuit Court of Appeals, Fourth Circuit.

OLD NICK WILLIAMS COMPANY, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

We, the undersigned, of counsel for the petitioner, do hereby certify that in our judgment the foregoing petition for a re-hearing is well founded, and that the same is not interposed for delay.

BURWELL & CANSLER,
W. P. BYNUM, JR.,
THOS. SETTLE,
J. E. ALEXANDER,
MOORE & ROLLINS,
Attorneys for Petitioner.

Order Allowing Plaintiff in Error Until May 25, 1907, to File Brief in Support of Petition for Re-hearing.

Filed May 4, 1907.

United States Circuit Court of Appeals, Fourth Circuit.

OLD NICK WILLIAMS COMPANY, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

In this above entitled cause it is ordered that the plaintiff in error, Old Nick Williams Company, have until the 25th day of May, 1907, in which to file and print brief in support of the petition to rehear filed herein.

This the 4th day of May, 1907.

J. C. PRITCHARD.

Order Refusing Re-hearing.

Filed Sept. 13, 1907.

United States Circuit Court of Appeals, Fourth Circuit.

No. 709.

THE OLD NICK WILLIAMS COMPANY, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error.

In Error to the District Court of the United States for the Western District of North Carolina, at Greensboro.

This court having at its February Term, 1907, rendered its decision affirming the judgment of the said District Court appealed from in this cause, and the plaintiff in error, by its attorneys, having on the 4th day of May, 1907, presented to the court a petition for a rehearing of the cause, and the same having, together with brief filed therein in support of said petition, been carefully considered,

It is now here ordered by this court, that the rehearing asked for, be, and the same is hereby refused.

J. C. PRITCHARD,
Circuit Judge Presiding.

Sept. 13, 1907.

Order Further Staying Mandate.

Filed Sept. 13, 1907.

United States Circuit Court of Appeals, Fourth Circuit.

No. 709.

THE OLD NICK WILLIAMS COMPANY, Plaintiff in Error.
vs.
THE UNITED STATES, Defendant in Error.

In Error to the District Court of the United States for the Western District of North Carolina.

Upon application of the plaintiff in error, it is ordered, that the mandate in this cause be further stayed pending application of the plaintiff in error to the Supreme Court for a writ of certiorari, provided such application is made within sixty days from this date.

J. C. PRITCHARD,
Circuit Judge Presiding.

Sept. 13, 1907.

Clerk's Certificate.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In testimony whereof I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit at Richmond, this 12th day of October, A. D., 1907.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

United States Circuit Court of Appeals, Fourth Circuit.

UNITED STATES OF AMERICA:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do make return of the annexed writ of certiorari issued out of the Supreme Court of the United States in the cause therein entitled on the 27th day of December 1907, by annexing hereto a certified copy of the stipulation of the attorneys of record, that the certified copy of the transcript of the record therein now on file in the office of the clerk shall be taken as the

return of the clerk of the Circuit Court of Appeals for the Fourth Circuit to the writ of certiorari issued herein.

In testimony whereof I hereto set my hand and affix the seal of the said Circuit Court of Appeals on this 10th day of January, A. D. 1908.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, 4th Circuit.

C. M. D.

In the Supreme Court of the United States, October Term, 1907.

No. 501.

OLD NICK WILLIAMS COMPANY, Petitioner,
v.
THE UNITED STATES.

Stipulation as to Return.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record therein now on file in the office of the clerk shall be taken as the return of the clerk of the Circuit Court of Appeals for the Fourth Circuit to the writ of certiorari issued herein.

MOORE & ROLLINS,
Of Counsel for Petitioner.
H. M. HOYT,
Solicitor General.

January 2, 1908.

UNITED STATES OF AMERICA, *ss:*

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing stipulation of counsel is a true copy of the original filed January 10, 1908, and now remaining among the records and proceedings in the therein entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, on this 10th day of January, A. D. 1908.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, 4th Circuit.

C. M. D.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Old Nick Williams Company is plaintiff in error, and The United States is defendant in error which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Western District of North Carolina, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 27th day of December, in the year of our Lord one thousand nine hundred and seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 20,904. Supreme Court of the United States. No. 501. October Term, 1907. Old Nick Williams Co., *vs.* The United States. Writ of Certiorari. The execution of the within writ appears from certain schedules thereunto annexed. Henry T. Meloney, Cl'k U. S. Cir. Court Appeals.

[Endorsed:] File No. 20,904. Supreme Court U. S. October Term, 1907. Term No. 501. Old Nick Williams Co. *vs.* The United States. Writ of Certiorari & return. Filed Jan'y 11th, 1908.

Office Supreme Court, U. S.
FILED.
NOV 19 1907
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

October Term, 1907.

No. [redacted] 26.

OLD NICK WILLIAMS CO., PETITIONERS,

versus

UNITED STATES OF AMERICA, RESPONDENTS.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit,

and

BRIEF IN SUPPORT OF THE PETITION.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1907.

OLD NICK WILLIAMS COMPANY, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondents.

NOTICE

To E. A. Holton, Esq., United States District Attorney, for the Western District of North Carolina, Fourth Circuit:

Sir,—Notice is hereby given that, upon the verified petition of Old Nick Williams Company, petitioner, in the above entitled cause, and upon all the pleadings and proceedings herein, we shall on Monday, the ____ day of _____, 1907, at the opening of Court on that day, or as soon thereafter as counsel can be heard, submit a motion (a copy of which, together with a copy of said petition and of the brief in support of the same, is herewith served upon you), to the Supreme Court of the United States at the Capital, in the City of Washington, District of Columbia.

This the ____ day of October, 1907.

BURWELL & CANSLER,
WM. P. BYNUM, JR.,
THOMAS SETTLE,
J. E. ALEXANDER,
MOORE & ROLLINS,
Attorneys for the Petitioner, Old Nick Williams Company.

Service of this above notice acknowledged, this the ____ day of October, 1907.

_____
United States District Attorney.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1907.

OLD NICK WILLIAMS COMPANY, Petitioner,

vs.

THE UNITED STATES OF AMERICA, Respondents.

MOTION FOR CERTIORARI

Now comes Old Nick Williams Company, petitioner in the above entitled case and moves this Honorable Court that it shall by writ of certiorari or other process, directed to the honorable, the judges of the United States Circuit Court of Appeals for the Fourth Circuit, require said Court to certify to this Court for its review and determination a certain case in said Court lately pending wherein Old Nick Williams Company was plaintiff in error and the United States of America were defendants in error, and to that end now tenders herewith its petition, together with a certified copy of the entire record in said cause in said United States Circuit Court of Appeals, and brief in support of the same.

This the ..... day of ....., 1907.

BURWELL & CANSLER,
WM. P. BYNUM, JR.,
THOMAS SETTLE,
J. E. ALEXANDER,
MOORE & ROLLINS,
Attorneys for Old Nick Williams Company.

Service of this motion, of notice of submission thereof to the Supreme Court and of the petition for *certiorari* and brief in support of the same acknowledged, this ..... day of ....., 1907.

U. S. District Attorney for Western District of North Carolina.

IN THE
SUPREME COURT OF THE UNITED STATES.

OLD NICK WILLIAMS COMPANY, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondents.

PETITION

PETITION FOR WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT TO CERTIFY TO THE SUPREME COURT FOR ITS REVIEW AND DETERMINATION THE CASE OF OLD NICK WILLIAMS COMPANY, PLAINTIFF IN ERROR, PETITIONER, VS. UNITED STATES OF AMERICA, DEFENDANT IN ERROR, RESPONDENTS.

To the Honorable, the Supreme Court of the United States:

The petitioner, Old Nick Williams Company, respectfully shows to this Honorable Court, as follows:

Statement

The petitioner, together with N. Glen Williams and D. E. Kennedy, were jointly indicted by the grand jury of the District Court of the United States for the Western District of North Carolina at Charlotte, in said district, at the June term, 1905, of said Court in a bill of indictment containing fifteen counts.

1. In the first count after charging that the petitioner was a corporation duly incorporated under the laws of North Carolina, they were charged with unlawfully and wilfully engaging in and carrying on the business of a rectifier of distilled spirits with intent to de-

fraud the United States of the tax on spirits rectified by them.

2. In the remaining fourteen counts they were charged with various other offences against the revenue laws of the United States (Bill of Indictment, Printed Record, pages 6 to 14 inclusive).

On the 19th day of June, 1905, by an order duly made in the cause the case was transferred to the United States District Court at Greensboro, North Carolina, where on the 28th day of November, 1906, the same was duly tried before said District Court, his Honor James E. Boyd, United States District Judge, presiding, and a jury. The jury returned a verdict of not guilty as to the defendants N. Glen Williams and D. E. Kennedy upon all of the counts contained in the Bill of Indictment, and of not guilty as to the corporation, Old Nick Williams Company, upon all of the counts contained in the Bill of Indictment except the first and of guilty upon the first count in the bill of indictment.

After counsel for the defendant, Old Nick Williams Company, had moved in arrest of judgment and to set aside the verdict of the jury and for a new trial, and said motions had been overruled and exception taken, the Court, upon prayer for judgment, adjudged that the defendant, Old Nick Williams Company, pay a fine of Five Thousand Dollars and the costs of the suit. The defendant, Old Nick Williams Company, by its counsel, excepted to the judgment of the Court, whereupon it was duly ordered that counsel for defendant corporation have ninety (90) days to prepare and serve bill of exceptions; that the District Attorney be allowed thirty (30) days after the preparation and service of defendant's bill of exceptions to prepare his exceptions thereto, after which "his Honor will settle the bill of exceptions upon ten days' notice to the attorneys of the parties;" and it was further ordered "that when said bill of exceptions is filed they may be deemed as made in apt time." (Printed Record, pages 14 to 17 inclusive).

3. There were various orders of the Court extending the time for the preparation and filing of bill of excep-

tions and of docketing the record in the Court of Appeals.

The petitioner, plaintiff in error, duly filed and served upon the District Attorney its proposed bill of exceptions on the 15th day of April, 1906, within the time which had, by consent, been extended by the Court for the final preparation, service and filing of the same; and the District Attorney had, also within the time extended to him by consent and by the order of the Court, duly filed his certain objections and amendments thereto, all of which was within six months from the date of the rendition of the judgment against the petitioner. (Printed Record, page 20).

The Judge who tried the case had not, because of his official duties requiring that his time and attention be given to other matters, given the notice of ten days to the parties for the settlement of the bill of exceptions, as required by the order of the Court, when, on or about the 7th day of May, 1906, and before the expiration of the six months from the date of the rendition of the judgment against the petitioner and during a term of said District Court at Asheville in said District, counsel for petitioner, Old Nick Williams Company, appeared before the Judge who tried the case and requested him to fix a time and place when he would settle and sign the bill of exceptions; and said Judge stated to counsel that he would fix the time and place for settlement of the bill of exceptions and would notify the District Attorney and counsel for respondent of the same. Almost at once thereafter counsel for the petitioner gave notice to the United States District Attorney of this application having been made to the Judge and of his promise to settle the bill of exceptions, when the District Attorney expressed his willingness to this arrangement and assented to the same. (Answer to Motion to Dismiss, page 3, Printed Record).

The said Judge, because of his constant engagements in the discharge of his official duties, could not thereafter, within the period of six months from the date of the rendition of the judgment against the petitioner, settle and sign the bill of exceptions, nor did he give notice to counsel for the petitioner fixing the time and place for the set-

tlement by him of the same. (Answer to Motion to Dismiss, page 3, Printed Record).

4. The counsel for the petitioner were at all times after the filing of its proposed bill of exceptions anxious to have said bill of exceptions settled by the Court, and were ready to appear before the Court for the purpose of the settlement of the same at any time. In fact, the petitioner, Old Nick Williams Company, its agents, officers and attorneys, did at all times after the rendition of the said judgment against the petitioner, exercise, as the petitioner is advised, informed and believes, due dilligence in preparing said bill of exceptions and in doing all other things required or proper to be done by it or them looking to the settlement and signing of said bill of exceptions by the Court, the filing of its assignments of error and the suing out of the writ of error from the United States Circuit Court of Appeals within six months from the date of the rendition of said judgment against the petitioner, that the same might be reviewed by the United States Circuit Court of Appeals.

Almost immediately after the six months had elapsed from the rendition of said judgment against defendant, your petitioner, through its counsel again made application to the said Judge to settle the bill of exceptions in the case, that it might properly petition the Court for the allowance of the writ of error directing the transfer of the record and proceedings to the Circuit Court of Appeals for the purpose of having said judgment reviewed and reversed, but his Honor, the District Judge who tried the case, being then in doubt as to his power at this time to settle the bill of exceptions without being directed to do so by the United States Circuit Court of Appeals, in some proper proceeding instituted in that Court for the purpose of securing such directions, declined to settle the bill of exceptions; whereupon the petitioner, for the purpose of procuring a settlement of the bill of exceptions and procuring the issuance of the writ of error, made petition to said United States Circuit Court of Appeals on or about the _____ day of July, 1906, which was the earliest day it could apply to said Court, stating fully the facts hereinbefore stated, and prayed that the Court issue its

writ of mandamus directing said District Judge to settle the bills of exceptions according to the truth of the matters which took place before him at the trial of the cause, and when so settled, to sign and seal the same as of the 15th day of April, 1906, that being the date when the proposed bill of exceptions was filed by the petitioner as permitted by the order of the Court, and that the petitioner be thereafter permitted to file its petition for writ of error, accompanied by its assignments of error, and that the said writ of error be issued as of that date. And said petition was duly filed in said United States Circuit Court of Appeals and duly docketed upon the records of the same, and was at the date of the hearing and argument of this case before said Court, and at the date of the rendition by said Court of its judgment dismissing the writ of error herein, pending therein.

5. That thereafter, without action having been had by said United States Circuit Court of Appeals upon said petition for mandamus, his Honor James E. Boyd, United States District Judge, before whom said case was tried, conceiving it to be within the jurisdiction of the District Court and his duty as said judge so to do, did, on the 27th day of July, 1906, duly made and enter in said cause an order and judgment in words and figures as follows:

"United States of America
vs.
Old Nick Williams Company.

"It appearing to the Court that the defendant, Old Nick Williams Company, has filed with the Clerk of this Court within the time required by the order of the Court its bill of exceptions, to which, within the time required by the order of the Court, the United States District Attorney filed certain objections and amendments, and that the bill of exceptions has not been settled, signed and sealed by the Court within six months from the date of the entry of judgment herein, and the Court being of opinion that the defendant, Old Nick Williams Company, is entitled, under the circumstances, to have said bill of exceptions settled and a writ of error and citation issued and served *nunc pro tunc* and as within the time required by

law, to procure a review of the judgment of the Court pronounced against it.

"It is now ordered that the parties or their attorneys appear before the undersigned at his Chambers at Greensboro, N. C., on the seventh (7th) day of August, 1906, when and where said bill of exceptions will be settled, signed and sealed by the Court.

"It is further ordered that when said bill of exceptions shall have been so settled, signed and sealed by the Court, that, after petition for writ of error and assignments of error shall have been filed by the defendant, a writ of error and citation in due form be issued and served, all of which shall bear date as of the 15th day of April, 1906, said date being the date on which said defendant filed its proposed bill of exceptions with the Clerk herein and within the period of six months from the date of the entry of the judgment herein aforesaid.

This the 27th day of July, 1906.

JAS. E. BOYD,
U. S. Judge;"

and thereupon directed the Clerk of said District Court to issue notice of the said order to the United States District Attorney and to the attorneys of record of the petitioner, Old Nick Williams Company. (Page 20 of the Printed Record).

Thereafter after due notice to the District Attorney and the attorneys for the petitioner, Old Nick Williams Company, his Honor, the said District Judge, settled, allowed, signed and sealed the bill of exceptions appearing in the record (pages 86 to 233 inclusive of the Printed Record), and duly filed the same in the office of the Clerk of said District Court; whereupon the plaintiff in error did forthwith duly make and file petition, accompanied by its assignments of error, praying "that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Fourth Circuit for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals." (Printed Record, pages 233 to 257 inclusive), and at the same time made and filed in said Court a suffi-

cient bond for the prosecution of the writ of error to effect and to answer all damages and costs if it fail to make good its plea, which bond was duly approved by the Court.

Upon the filing of said petition, assignments of error and bond, his Honor, the District Judge, duly allowed the writ of error, which was duly issued, and was, as directed in said order, dated as of April 15, 1906; and in obedience to said writ of error, "the record and proceedings aforesaid, with all other things concerning the same" were duly certified to the United States Circuit Court of Appeals for the Fourth Circuit that it "may cause further to be done therein to correct the error, what of right, and according to the laws and custom of the United States should be done."

6. That thereafter, after the said case and the record and proceedings aforesaid had been duly docketed in said United States Circuit Court of Appeals, the United States, the defendant in error therein, by its attorney, moved in said Court of Appeals to dismiss the writ of error theretofore issued from said Court of Appeals to said District Court upon the grounds:

"1st. For that the writ of error was not issued within six months after the entry of the judgment of the Court sought to be reviewed, the judgment having been entered November 28, 1905 (see page 17 of the record), and the writ of error was not issued by the Court until September 12, 1906. (See Record, page 260).

"2d. For that the District Judge had no power to extend the time for issuing the writ of error. (For order extending time see Record, page 20)."

7. The petitioner, Old Nick Williams Company, made answer upon oath to the motion to dismiss the writ of error, and filed with the answer a brief in support of the same, both of which are found in the record certified to this Court by the United States Circuit Court of Appeals and filed with this motion for *certiorari*. In this answer the petitioner, Old Nick Williams Company, set out the facts in substance as hereinabove stated.

8. The motion to dismiss the writ of error was heard in the said Circuit Court of Appeals with the argument

upon the bill of exceptions and assignments of error on February 11, 1907, and afterwards, on the 12th day of April, said Circuit Court of Appeals dismissed the writ of error for the reason "*that the writ of error was not sued out within six months from the entry of judgment.*"

The language of the Court is as follows: "We feel ourselves reluctantly constrained to hold that we are without jurisdiction to examine the alleged errors *for the reason that the writ of errors was not sued out within six months from the entry of judgment.*"

Thereafter, in due time, the petitioner filed its petition before said United States Circuit Court of Appeals to rehear the case and accompanied the same by a brief in support thereof. This petition and brief are found in the record certified to and filed in this Court. On the..... day of September, 1907, the said Circuit Court of Appeals entered an order declining to rehear the case.

9. A certified copy of the transcript of the record of said case, including all proceedings in the Circuit Court of Appeals, is herewith furnished as part of this application in conformity with Rule 37 of this Honorable Court relative to cases from the Circuit Court of Appeals, and the same is marked "Exhibit A;" and the petitioner has furnished and filed besides nine printed uncertified copies of such record, which also contain all proceedings in the Circuit Court of Appeals, and they have had printed and filed also twenty-five copies of this petition, together with twenty-five copies of the brief in support of the same.

10. Your petitioner is advised and believes that the judgment of the United States Circuit Court of Appeals, dismissing the writ of error in this case, is erroneous and that this Honorable Court should require the said case to be certified to it for its review and determination under and in conformity with the provisions of the sixth section of the Act of Congress entitled, "An Act to Establish Circuit Courts of Appeals and for Filing and Regulating in Certain Cases the Jurisdiction of the Courts of the United States, and other purposes," approved March 3, 1891, the said case being made final in the said Circuit Court of Appeals by said act.

The case was decided in the said Circuit Court of Appeals and the writ of error dismissed because the same, the writ of error, had not been sued out and filed in the Circuit Court in which the case was tried until after the expiration of six months from the rendition of the judgment against the petitioner, and the decision was based entirely upon the question of the jurisdiction of the Circuit Court of Appeals to entertain the case.

The petitioner therefore insists:

I.

The Circuit Court of Appeals erred in its holding and ruling that it did not have jurisdiction to hear and determine the case upon the merits and to pass upon the errors set out and stated in the bill of exceptions and assignment of errors.

II.

The Circuit Court of Appeals should have taken into consideration the fact, which appears in the record, which it did not do, that the petitioner, plaintiff in error, had to rely solely upon its counsel to prepare the petition for writ of error and assignments of error and to present the same to the Court for allowance; and that, on this account, the fault, if any, of delay in procuring the writ of error and in filing the assignment of errors until after six months from the rendition of judgment, was entirely that of its counsel and not of itself, and that, therefore, the laches, neglect and delay, if any there was, was, so far as the petitioner is concerned, excusable.

III.

The Circuit Court of Appeals erred in that it was not advertent to the facts shown in the record that the petitioner was not itself at fault or to blame for the delay in petitioning for and procuring the writ of error, but that it had done all it could do to procure the writ; and it erred in that it was not advertent to and did not give effect to, the Statute of North Carolina, Section 513 of the Revisal of 1905 of North Carolina; which statute is a

statement of the general law upon the subject of mistake, inadvertence and excusable neglect, and applies, and is controlling, it is insisted, in this case. This Section of the Revisal of North Carolina reads as follows:

"MISTAKES, SURPRISE, EXCUSABLE NEGLECT: The Judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence and surprise or excusable neglect, and may supply an omission in any proceeding."

IV.

The Circuit Court of Appeals erred in that it was not advertent to the fact that the Circuit Court had, after proceedings for mandamus to compel a settlement of the bill of exceptions had been instituted in the Circuit Court of Appeals, ordered and adjudged, on July 27, 1906, "that the defendant, Old Nick Williams Company, is entitled, under the circumstances, to have said bill of exceptions settled and a writ of error and citation issued and served *nunc pro tunc* as within the time required by law to procure a review of the judgment of the Court pronounced against it;" and that it was not advertent to the fact that said court had first found as a fact, as stated in the order and judgment, that the plaintiff in error, the petitioner, "has filed with the Clerk of this Court its bill of exceptions, to which, within the time required by the order of the court, the United States district attorney filed certain objections and amendments."

The Circuit Court of Appeals should have held and ruled that this order and judgment of the Circuit Court based upon the findings of fact stated in the order was such an order and judgment as the Circuit Court had the jurisdiction and power to make, and that the same was conclusive of the rights of the parties to the case.

V.

The Circuit Court of Appeals erred in that it was not advertent to, and did not give effect to the facts stated in

the answer and herein "that the judge who tried the case had not, because of his official duties requiring that his time and attention be given to other matters, given the notice of ten days to the parties for the settlement of the bill of exceptions, when on or about the 7th day of May, 1906, and before the expiration of the six months from the date of the rendition of the judgment against the petitioner, and during the term of said District Court, held at Asheville, in said district, counsel for petitioner, Old Nick Williams Company, appeared before the judge who tried the case, and requested him to fix a time and place when he would settle and sign the bill of exceptions, and that said judge did then state to counsel that he would fix the time and place for the settlement of the bill of exceptions and would notify the district attorney and counsel for the respondent of the same;" and that "almost at once thereafter counsel for the petitioner gave notice to the United States district attorney of this application having been made to the judge and of his promise to settle the bill of exceptions, when the district attorney expressed his willingness to this arrangement and assented to the same." (Page 3 of Answer to Motion to Dismiss, Printed Record).

The petitioner, the plaintiff in error, insists that under these circumstances and upon these undisputed facts, the United States, defendant in error, was estopped to move to dismiss the writ of error; further it insists, that the natural and necessary effect of such agreement made and entered into by the district attorney with counsel of petitioner, delaying the settlement of the bill of exceptions until after the expiration of six months from the rendition of judgment, was to induce, in fact, create, the belief on the part of counsel for the petitioner, that time was not of the essence and that the petition for writ of error and assignment of errors might thereafter be filed and the writ of error thereafter issued; and that, because of these facts and because of the conduct and agreement of the district attorney inducing such belief on the part of counsel for the petitioner, upon which belief the petitioner and its counsel acted and relied; and because, further, of the order of the Court made on the trial (Printed Record,

page 17), without objection, that "when said bill of exceptions is filed they may be deemed as made in apt time," the Circuit Court of Appeals was not deprived of its jurisdiction simply because the writ of error was not issued within the period of six months from the rendition of the judgment, and should have so ruled and held.

From the facts hereinabove stated and the facts appearing in the record, it is made to appear, as the petitioner insists, that the matters involved in the decision of the Circuit Court of Appeals dismissing the writ of error, are of serious and grave moment. The question of the jurisdiction of the Circuit Court of Appeals, as petitioner insists, is directly brought in question. In fact, the decision involved only the question of jurisdiction of the Circuit Court of Appeals to adjudicate and determine the rights of parties in cases brought to that court by writ of error issued after the expiration of six months from the date of entry of judgment in the Circuit Court.

The judgment of dismissal was in fact a determination of the Circuit Court of Appeals that under no circumstances, did that Court have jurisdiction to hear and determine any question in dispute in any case, no matter how important; no matter what excuses or reasons may exist for a failure to sue out the writ of error within six months, unless the writ of error had been applied for and issued within the period of time prescribed by the statute. It was, in effect, a holding and ruling by the Court of Appeals that the prosecution could not put itself in a position where it would be estopped to take advantage of the fact that the writ of error had not been issued within the statutory period; and that, under no state of facts or circumstances, although the appellant might be wholly blameless and without fault, could the plaintiff in error or appellant be excused for delay in having the writ of error issued beyond the period of six months from the entry of judgment.

The petitioner further insists that this matter is one of great concern, not only to the petitioner, but to the prosecution as well.

It cannot be the policy or purpose of the United States to deprive its citizens of money to which it is not

entitled. It does not demand the life, liberty or the property of its citizens upon a mere technicality. It asks only justice and requires the life, the liberty and the property of the citizen only when it clearly appears that the public good and the law demands it; and then only after the fullest and fairest trial in the courts of the country.

When the citizen is required to part with his property to the Government, there should be something more than an apparent due process of law and he should be made to feel that no advantage has been taken of him; that he has had a fair trial upon the merits of his case before the courts of his country upon the charges made by the government against him.

Besides, the matter now involved has not, as the petitioner is advised, been decided by this Court; that is, this Court has not decided that a writ of error cannot be issued after the expiration of the statutory period when the plaintiff in error or appellant is not at fault. This Court has not decided, as it is advised, that the court issuing the writ after expiration of the statutory period, under such circumstances, does not acquire jurisdiction. This Court has not decided, as it is advised, that the prosecution cannot estop itself, by its acts and conduct causing or bringing about delay in issuing the writ, to take advantage of the delay. The authorities, federal and state, are much in conflict upon this question, and it is respectfully submitted that the same should finally be determined by this Court.

Wherefore, for these reasons, your petitioner respectfully prays that the writ of certiorari may issue out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding the said Court to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in said case therein entitled "Old Nick Williams Company, plaintiff in error, v. the United States of America, defendant in error, No. 709," to the end that the said case may be reviewed and determined by this Court as provided in Section 6 of the Act of Congress entitled "An Act to Establish Circuit

Courts of Appeal and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1901; or that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity with said act, and that said judgment of the said Circuit Court of Appeals on said case and every part thereof, may be reversed by this Honorable Court.

And your petitioner ever prays, etc.

OLD NICK WILLIAMS COMPANY,
By

BURWELL & CANSLER,

WM. P. BYNUM, JR.,

THOMAS SETTLE,

J. E. ALEXANDER,

MOORE & ROLLINS,

its attorneys.

STATE OF NORTH CAROLINA,
County of.....

Before the undersigned, a Notary Public in and for the County and State aforesaid, personally appeared N. Glen Williams, who, being by me first duly sworn, deposes and says: That he is an officer of the corporation, Old Nick Williams Company, to wit, ... thereof, and that he is empowered and authorized to make this oath for and on behalf of said corporation; that he has read the foregoing petition subscribed by the Old Nick Williams Company, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, as to which he believes the same to be true.

.....

Sworn to and subscribed before me this day.

In witness whereof I have at my office in....., County of....., State of North Carolina, hereunto set my hand and affixed my notarial seal, this the .....day of October, 1907.

.....

Notary Public in and for.....County, N. C.

My commission expires on the.....day of.....
.....190....

Brief of Petitioner, Old Nick Williams Company, in Support of Application for Writ of Certiorari.

A statement of the facts and the proceedings in the United States Circuit Court of Appeals is contained in the foregoing petition, to which reference is made.

Argument

The act of Congress, approved March 3, 1891, entitled "An Act to Establish Circuit Courts of Appeal and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for other purposes," among other things, provides "that the plaintiff in error or appellant shall file with the Clerk of the Court below with his petition for the writ of error or appeal an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of error shall have been filed."

This is the language of Rule 35 of the Supreme Court of the United States and the same is incorporated into Rule 11 of the Circuit Court of Appeals for the Fourth Circuit.

A most diligent inquiry fails to disclose any case where the assignment of errors was not based upon the bill of exceptions, except when based alone upon the record proper. Prior to the adoption of Rule 35 of the Supreme Court of the United States writs of error were sometimes issued before the settlement of the bill of exceptions and often without filing with the petition for a writ of error the assignment of errors; and it was on this account, and for the purpose of preventing the issuing of the writs of error without an assignment of errors, that Rule 35 was adopted, and that the act of Congress, known as the Evarts Act, ratified March 3, 1891, was enacted.

As a practical matter it must be apparent, we think,

that a proper and accurate assignment of errors cannot be made until the bill of exceptions is settled. Under the practice prevailing in all the courts if the assignment of errors is not based upon and does not conform to, the bill of exceptions, it is not considered by the court; and, as a matter of fact, as is apparent in this case, it is an impossibility to form an assignment of errors, based upon the exceptions noted by the judge during the progress of trial. The notations of exceptions made during the trial by the judge, are only *memoranda* made by him, and are not open to inspection of the parties. Counsel could not in this case, or in any case coming under their observation, have prepared any proper or sufficient assignment of errors in advance of the settling of the bill of exceptions. It is the universal practice, we think we can safely say without contradiction, to await the settlement of the bill of exceptions to prepare the assignment of errors. Any other course would be like shooting at random into the forest in the hope of killing game.

The rule as generally applied is well stated in 3d Ency. Plead. and Prac., 387, as follows:

"WHERE BILL REQUIRED—EXCLUSIVENESS OF REMEDY.—1.—GENERAL RULE.—Where bill of exceptions lies and no alternative mode is allowed by statute the remedy is exclusive. It is the sole means by which matters in *pais* are brought up before the appellant court."

This authority is supported by numerous cases cited in notes 1 and 2.

In Volume 2 Cyc. 1076-1077, it is stated:

"NECESSITY OF BILL OF EXCEPTIONS, CASE OR STATEMENT OF FACTS.—DECISIONS NOT OTHERWISE REVERSIBLE. (a) IN GENERAL. Where the error sought to be remedied appears upon the record, the party agrieved may avail himself of it on appeal or writ of error without bill of exceptions, case, statement, or other statutory remedy. But the rulings and decisions of the lower Court, the correctness of which cannot be determined from the record proper, must be made a part of the transcript by bill of exceptions,

case, statement of facts or other modes prescribed by the statutes in order to have review by the Appellate Court."

This is also supported by many authorities in the notes.

In Volume 2 Ency. Plead. and Prac., 965, 966, it is said:

"FOUNDED ON EXCEPTION.—It follows that if the rulings claimed to be erroneous were not properly excepted to in the Court below and preserved in a bill of exceptions, they will not be entitled to consideration when assigned."

Again at page 965 of 2 Ency. Plead. and Prac., it is said:

"The assignment of errors is predicated upon the record and error may not properly be assigned upon matter not appearing therein."

As to the necessity for an assignment of errors, it is said in 2 Ency. Plead. and Prac., at page 922,

"NECESSITY FOR ASSIGNMENT 1.—IN GENERAL.—It is generally said that the assignment of errors of the Appellate Court is just as essential as the declaration or complaint in the lower court.

"It is jurisdictional and cannot be dispensed with by agreement of the parties. Without it the Court has no means of knowing what rulings are presented for its review, and, in fact, has nothing before it."

And at pages 923, 924, 925 and 926, it is said:

"EFFECT OF FAILURE TO FILE.—The failure to file an assignment of errors must consequently entail affirmance of the judgment or decree or dismissal of the appeal.

"ERRORS NOT CONSIDERED.—As the purpose of the assignment is to relieve the Court of the onerous and time-consuming task of examining a voluminous record, errors not complained of in it, although there is some assignment, will not be considered, even though urged *viva voce* at the hearing."

These authorities are so well supported by decisions,

both state and federal, found in the notes, that we think it unnecessary to make further citations.

In our case none of the exceptions made upon the trial, except those made to a refusal of the Court to set aside the verdict and award a new trial, and to the refusal of the motion in arrest of judgment appear in the record proper. (Printed Record, page 17).

All of the other exceptions had to be presented by the bill of exceptions; for instance, a motion was made for a new trial; for that, in no view of the evidence giving the Government the benefit of all of the same and of all reasonable inferences and deductions therefrom, the defendant being a corporation and incapable, on that account, of forming the corrupt purpose and intent denounced in the statute and charged against it in the bill of indictment, could not be guilty of the crime of which it was convicted. This exception could only be presented to the Court by a bill of exceptions. Again, the Court refused all the special prayers of defendant below for instructions to the jury to which exceptions were taken, as appears in the record proper. These could only be presented for review by a bill of exceptions. The Court charged the jury at length, and to parts of this charge there was exception, as appears in the record. The exceptions to such refusal could only be presented by a bill of exceptions. An examination of the bill of exceptions will show that each and every error alleged and relied upon by the plaintiff in error, except as above stated, was such that they could only be presented to the Circuit Court of Appeals by the bill of exceptions.

It is insisted, therefore, that it was an impossibility, before the settlement of the bill of exceptions, to file the assignment of errors required by Rule 35 of the Supreme Court of the United States and the Act of Congress, approved March 3, 1891, which provides that, "No writ of error or appeal shall be allowed until such assignment of errors shall have been filed," with accuracy.

As the assignment of errors must conform to and be based upon the bill of exceptions, it would, we think, be unreasonable to require of the plaintiff in error that it file

an assignment of errors with its petition for the writ of error before settlement of the bill of exceptions.

The notes of the exceptions taken on the trial are made by the Judge who tries the case, and are in his control; and, in fact, in his exclusive possession. The *memoranda* kept by counsel, if any at all are made by them, may be inaccurate; and certainly, in practice, are controlled and governed always by the notes kept by the Judge, or by his recollection, and not by *memoranda* kept by counsel.

Any assignment of errors, therefore, made before the settlement of the bill of exceptions, is necessarily merely guess-work. It may be accurate and sufficient, but the chances, perhaps one hundred to one, are that it is inaccurate, does not agree with the *memoranda* kept by the Judge, and is altogether insufficient. Considering this fact, which must be admitted to be true, we think, in connection with the unbending rule that the assignment of errors will not be considered unless it conforms to, and is properly based upon, the bill of exceptions, it is submitted that to be required to file an assignment of errors before it is known what the exceptions are which will be allowed by the Court, is not in accord with justice; and is, on that account, as well as because at variance with universal practice, not the rule which ought to control in such cases.

It cannot be insisted, we respectfully submit, as a reason why a guess-work bill of exceptions should be patched together and filed with the petition for writ of error before the settlement of the bill of exceptions, that the Court may, in its discretion, in the event the assignment of errors is inaccurate, insufficient and does not conform to and is not based upon, the bill of exceptions, grant leave to the plaintiff in error to file a new, accurate and proper assignment of errors. It is exceedingly doubtful, whether the Court could, if the plaintiff in error had undertaken to prepare and file an assignment of errors before the settlement of the bill of exceptions, have permitted an amendment or correction of the assignment of errors. But whether it could or not, it would be manifestly unjust to place the plaintiff in error in a position where

it would be compelled to rely upon the exercise or discretion of the Court in its favor.

It cannot be that the plaintiff in error, if it is entirely without fault, and has done all it could do to procure the bill of exceptions, so that it might intelligently and properly, in accordance with the universal practice in such cases, prepare its petition for writ of error and its assignment of errors, can be thus deprived of its right of appeal. Suppose, for instance, the plaintiff in error had filed its petition for writ of error, with an assignment of errors, after settlement of the bill of exceptions, and within six months from the entry of judgment; and that the Judge had held up the matter, promising to allow the writ of error; and that then, at the last moment, he had refused to allow the writ, when it was impossible for the plaintiff in error to apply in time for a mandamus to compel the issue of the writ? Until the refusal of the judge to allow the writ no mandamus could be asked for, as refusal to grant the writ is necessary before invoking the aid of mandamus by the Appellate Court. The bare statement of the case is sufficient argument in refutation of the position of the prosecution, we think. If not, the principle expressed in the maximum of universal application, *actus curiae neminem gravabit*, should be erased from the law books.

Chief Justice Clark, in his recent work on Appeal and Error, published in the 2 and 3 volumes of Cyc. at page 44, Vol. 3, says:

"Where a bill of exceptions is presented to the trial Judge within the time prescribed, the rights of appellant or plaintiff in error, will not be prejudiced by the Judge's delay in signing it. In such case the maxim *actus curiae neminem gravabit* applies." (Citing numerous authorities in note 16.)

And it is well settled that in case of necessity "the power of an appellate court in aid of its appellate jurisdiction to compel a trial judge to sign a bill of exceptions is well established.

3 Cyc., 47;

19 Am. & Eng. Ency. of Law, 2d Edition, page 844. Note 4;

Ex parte Bradstreet, 4 Peters 102, Law Edition, Book 7, page 796;
Scaife vs. Land Company 87 Fed Rep. 308, 30 C. C. A., 664;
3 Ency. P. & P. 488, 489, 490;
3 Cyc., 49; note 36.

"Mandamus will lie to compel judicial officers to act and exercise their judgment and discretion, or to perform mere ministerial duties imposed upon them by law."

19 Am. & Eng. Ency. L. (2 Edition), 744 and authorities cited.

The Court will in all cases grant the writ if under the established rules of law the person applying for it is entitled to it. "Indeed, many cases go so far as to call the writ a writ of right or in the nature of a writ of right."

19 Am. & Eng. Ency. L. (2 Ed.) 751-2-3, and notes 1 and 2.

"But the right to the writ and the prerogative power to issue it, has ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable. It is so held by this Court in the case of Kendall v. United States, 12 Pet., 615; Kendall v. Stokes, 3 How., 100;"

Ex Parte Kentucky v. Dennison, 24 How., 66;
19 Am. & Eng. Ency. L. (2 Ed.) 781, citing Hartman v. Greenhow, 102 U. S. 675;
Union Pac. v. Hall, 91 U. S. 343;
Riggs v. County, 6 Wall. 166;
Kendall v. U. S. 12 Pet. 524;
Kendall v. Stokes, 3 How., 100;
People v. R. R. Co. 42 Fed. 638.

"Mandamus will lie to compel a judge to sign, settle and seal a bill of exceptions or statement of facts in a proper case."

19 Am. & Eng. Ency. L. (2 Ed.) 844, citing Scaife v. Western M. C. &c., 87 Fed. Rep. 308,
Ex parte Crane 5 Pet. 190; and
Chateaugay Ore. etc. Co., Petitioner, 128 U. S. 544, and numerous cases from nearly all the states.

"But when the time for preparing a bill of exceptions has been extended by the trial judge, he may be compelled to settle or sign a bill if presented within the time as extended. So also, when the relator has done all in his power to perfect his right, it cannot be affected by the delay of the judge or adverse party."

19 Am. & Eng. Ency. L. (2 Ed.) 847.

As to when *mandamus* will issue see:

Ex parte Chateaugay, 128 U. S., 544;

Scaife v. Land Company, *supra.*

3 Ency. Plead. and Prac., 488, *et seq.*

The case, *ex parte* Chateaugay, 128 U. S., 542, is a very important one, and is, we think, decisive upon the question of the power of the Court to grant relief, as well as to when and under what circumstances relief should be granted.

In this connection, we call to the attention of the Court the brief filed in the Court of Appeals in support of the answer to the motion of defendant in error to dismiss, and brief in support of the petition to rehear. And in addition thereto we quote from 2 Cyc. 801, as follows: "If delay in taking an appeal or suing out a writ of error is caused by the acts or omissions of the Court or some official thereof when concurrence of the Court or such official is necessary, the appeal may be taken or the writ of error sued out after the expiration of the prescribed time."

Mr. Merrill, in his work on Mandamus, at Sec. 208, uses this language:

"Where a party is entitled to an appeal from a decree or judgment against him, he may, by the assistance of the writ of *mandamus*, compel the allowance of such appeal, the duties of the Court in such cases being merely ministerial. The Court will be required by this writ to do all acts necessary to make the right of appeal efficacious; to enter a *nunc pro tunc* order as of date of the motion; to make a record of the allowance of an appeal from a judgment of the probate court; to allow an appeal from the probate of a codicil of a will; to make out and deliver a transcript for the appeal or writ of error; and to enter-

tain an application for the examination of an appeal bond, and, if found sufficient, to grant a supersedeas. It is no objection that the time for the doing of the act of the judge of the court has expired, if the application was made in proper time. A party is not to be deprived of such rights by the negligence of public officers."

See also notes to these authorities.

In this connection we cite the case of Brooks vs. Norris, 11 How. 204. This case decides, in effect, that the lapse beyond the statutory period for suing out the writ of error is not jurisdictional. In this case the defendant in error had moved upon the face of the record, it appearing that the writ of error had not issued within the statutory period, to dismiss. The Court, the statutory period having expired, dismissed the case, but Chief Justice Taney said, "*It is a defense which the defendant in error may or may not rely upon, as he, himself thinks proper.*" In this case no excuse or reason was given by plaintiff in error for the delay in suing out the writ of error. It did not appear, in this case, that the plaintiff in error was not in fault, causing the delay; nor did it appear that the delay was caused by an officer of the Court; hence the case was dismissed upon the motion of defendant in error. This case is cited for the position that the failure to sue out the writ of error within the statutory period does not go to the jurisdiction of the Court or its power to decide the controversy. The Court has jurisdiction unless the defendant in error, *if he sees proper to do so*, relies upon the failure. If he does not do so the Court has jurisdiction to hear, in fact, must hear and determine the matter.

At most, it could only be claimed that the statute is one of limitations. A defendant against whom a claim is barred by the statute need not plead the statute of limitations. In the language of Judge Taney, "*It is a defense which the defendant in error may or may not rely upon as he himself thinks proper.*" Chief Justice Clark, Vol. 2 Cyc. 804, says: "According to English practice, which has been followed in some cases in this country, the defendant in error must avail himself of the defense of the statute of limitations by plea and cannot take advantage of it by motion; nor can the Court judicially take notice

of it, *as the limitation of time is not an objection to the jurisdiction of the Court.*" He cites the case of Brooks v. Norris, *supra,* as authority for this position.

Unquestionably, we take it, the Court had the right to extend the time for the settlement of the bill of exceptions. "Generally, it is required that the bill of exceptions should be settled and signed during the trial term, but this time may be enlarged by an order of the Court made during the term, or by consent."

2 Foster Federal Practice, 3d Edition, Sec. 377, pp. 888, 889 and 890.

It is said that "it is the safer practice to date the bill of exceptions at a day within the time as originally limited, and to insert in the order a provision that the bill of exceptions be signed, sealed and filed *nunc pro tunc.*"

"Originally, exceptions were required to be taken at the time the alleged erroneous ruling or decision was made, and the appeal must have been presented, settled, signed and sealed before the verdict, or before the jury were discharged. But, to meet the convenience of Bench and Bar, the practice obtained of allowing the appeal to be reduced to form after the judgment; the appeal in such cases being signed *nunc pro tunc.*" 3 Cyc., 37.

"Generally, it may be said that a bill of exceptions should be settled during the term of the Court at which the trial was had and judgment rendered, unless by consent or agreement of the respective parties, special order of the Court or under the provisions of the statute the time is extended." 3 Cyc. 38.

"Under modern practice the exceptions must be noted when taken, but leave may be given to reduce them to writing, and tender them for signature after the trial."

3 Ency. Plead. and Prac. 463, citing:
Walton v. U. S., 9 Wheat, 651;
Brown v. Clark, 4 How., 4;
Sweet v. Perkins, 24 Fed., 777;
French v. Edwards, 13 Wall., 506;
U. S. v. Carey, 110 U. S., 51;
Hunnicutt v. Peyton, 102 U. S., 354;
Stanton v. Embry, 93 U. S., 564, and many other cases, both state and federal.

"The bill should, in such cases, be signed *nunc pro tunc* so as to purport to be actually in form and signed during the trial." 3 Ency. P. & P., 464.

In the case of Hunnicutt vs. Peyton, *supra*, the Court said: "But when an exception has been taken at the trial and noted, reducing the exception to form afterwards and attesting it is not making a new case. It is merely verifying the case as it appeared on the trial."

In the case of Ward vs. Cochran, 150 U. S., 601, the Court said: "As this record discloses that the exceptions relied on were taken at the trial, and that the delay was in reliance on an express order of the Court, postponing the act allowing and signing the bills, we think that we are not precluded from a consideration of the errors assigned."

Failure Excused When Party Not at Fault

Under the circumstances and upon the facts shown in the record, that the petitioner, plaintiff in error, was not itself at fault, nor caused the delay in procuring the writ of error, but had done all that it could to procure the writ, the statute of North Carolina, which is in affirmance of the general law upon the subject of mistake, inadvertence and excusable neglect, applied. This section of the Revisal of North Carolina, 1905, reads as follows:

"MISTAKE, SURPRISE, EXCUSABLE NEGLECT.—The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding."

It must be taken as true, that plaintiff in error was himself without fault, and if there was fault at all causing delay in preparing and filing the petition for the writ of error and the assignment of errors, it was that of its counsel alone. The plaintiff in error could not, of course, prepare its assignment of errors, or even file its petition for the writ of error. As to this duty, it had, of

necessity, to rely solely upon its counsel, presumed to be diligent as well as skilful.

The Circuit Court of Appeals for the Fourth Circuit has recently held in the case of Virginia, Tennessee and Carolina Steel & Iron Company v. Harris, 151 Fed. Rep. 428, that this statute applies in all cases in the Federal Courts where the party is seeking relief "from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect."

In North Carolina it was held in the case of Grill vs. Vernon, 65 N. C. 76, that "Judgment by default against a party who has employed an attorney to enter his pleas and such attorney has neglected to do so, is a surprise within the meaning of this section; and the neglect of the parties to examine the docket and see that his pleas are entered, is an excusable neglect."

In the case of Greer vs. Reams 88 N. C. 197, the Court held that where counsel enters an appearance but fails to file an answer, the party litigant if in no way at fault himself, is entitled to relief against any judgment by default.

In the cases of English v. English, 87 N. C. 497, and Wiley v. Patterson, 84 N. C. 964, it was held that: "Where the negligence was that of the attorney and not of the party, a motion to set aside the judgment should be granted."

See also Boing vs. Railroad, 88 N. C. 62, Taylor vs. Pope, 106 N. C., 267, Bradford vs. Coit, 77 N. C. 72, and Gwaltney vs. Savage, 101 N. C. 103. It may be said that it has been held in North Carolina that under this statute it is within the discretion of the court to grant the relief prayed for. In reply we would say, that while it has been so held no case can be found in the books where the court has refused to grant the relief where it appeared and was found that the delay or neglect was excusable under the law; particularly in criminal actions involving the question of corrupt intent. In such actions no case can be found, it is insisted, where by reason of the neglect of counsel a right has been lost, the defendant being himself not guilty of laches or fault, relief has ever been refused.

"Such failure will be excused and relief granted, how-

ever, when it is caused by the act of the adverse party or of the Court and there has been no default or negligence on the part of appellant or plaintiff in error." 3 Cyc., 62. Note 91.

"The effect, generally, of a failure on the part of appellant or plaintiff in error to have a case or statement of appeal settled in time is to prevent a review by the appellate court of any matters to a consideration of which a case or statement is necessary; but where the failure to settle is caused by no fault of appellant, or where he is misled by the adverse party, or where the failure is caused through a *bona fide* mistake it may be excused and relief granted." 3 Cyc., 66. Notes 4, 5, 6 and 7.

EFFECT OF JUDGMENT OF THE CIRCUIT COURT THAT PETITIONER WAS ENTITLED TO SETTLEMENT OF BILL OF EXCEPTIONS AND WRIT OF ERROR.

The Court was not advertent to and did not take into consideration the fact that after the petition for *mandamus* had been filed in the Circuit Court of Appeals, but before action thereon by said court, his Honor, the District Judge who tried the case, "conceding it to be within the jurisdiction of the District Court and his duty as such Judge so to do, did, on the 27th day of July, 1906, duly make and enter in said cause an order and judgment in effect, that the petitioner, "plaintiff in error, is entitled under the circumstances, to have the bill of exceptions settled and writ of error and citation issued and served *nunc pro tunc* as within the time required by law to procure a review of the judgment of the court pronounced against it."

And further that "The parties or their attorneys appear before the undersigned at his chambers at Greensboro, North Carolina, on the 7th day of August, 1906, when and where said bill of exceptions will be settled, signed and sealed by the court."

And further that "when said bill of exceptions shall have been so settled, signed and sealed by the Court, that, after petition for writ of error and assignment of error shall have been filed by the defendant, a writ of error and citation in due form be issued and served, all of which

shall bear date as of the 15th day of April, 1906, said date being the date on which said defendant filed its proposed bill of exceptions with the Clerk herein and within the period of six months from the date of the entry of the judgment herein aforesaid."

It is insisted that the filing of the petition for mandamus on July 27, 1906, in the Circuit Court of Appeals conferred upon that court jurisdiction to require the judge who tried the case to settle the bill of exceptions; that when the District Court, after the filing of the petition for *mandamus*, made the order above recited it, in effect, decided, having at the time jurisdiction and the power to do so, that the defendant in error, petitioner, was not at fault or in any way guilty of laches or to blame for the delay in the settlement of the bill of exceptions.

If the District Court had the power to so hold and adjudge it was its duty upon such holding, to further hold and adjudge that, upon the petitioner filing its petition for writ of error and assignment of errors the writ of error should issue bearing date as within the six months from the entry of judgment. If this were not true, then the judge who tried the case, could not have been required by mandamus to settle any bill of exceptions at all.

The Circuit Court of Appeals, it is insisted, had plenary power in the premises, and upon the showing made in the petition for *mandamus*, it was its duty to issue the writ to the judge who tried the case, requiring him to settle the bill of exceptions. Certainly, the Circuit Court of Appeals could not forsee that the defendant in error would make the motion to dismiss the writ; and under the authority of Brooks v. Norris, *supra*, the Court, having the matter properly before it, no point being made that the writ of error had not been issued within the six months, could have properly required, by its writ of mandamus, that the judge below settle the bill of exceptions; and, doubtless, this writ would have been directed to issue had the judge below not acted without it. The District Judge when entering the order that the bill of exceptions be settled and that the writ of error issue as of a date prior to the expiration of the six months, was only doing that which the Court of Appeals had the right to compel,

and what it was his duty to do. It should be noted that no objection was made or exception taken to this order of the District Judge. The record shows that the only objection made by the prosecution was made at the time the bill of exceptions was settled. No bill of exceptions was asked by the prosecution to this order and judgment of the Court and none allowed; and no exception, based upon objection to this order, was before the Court of Appeals or now before this Court.

The petitioner, plaintiff in error, was entitled to have the bill of exceptions settled to enable it to file its petition for writ of error and to have the writ of error issued, all to bear date as of a time prior to the expiration of six months from the rendition of judgment. Certainly, it was so entitled unless objection was made that the time for settling it had expired, and none was made.

The Court was inadvertent to the facts alleged in the answer to the motion to dismiss and in the petition now filed, that "the judge who tried the case had not, because of his official duties requiring that his time and attention be given to other matters, given the notice of ten days to the parties for the settlement of the bill of exceptions as required by the consent order entered upon the trial in the Circuit Court, when on or about the 7th day of May, 1906, and before the expiration of the six months from the date of the rendition of the judgment against the petitioner and during the term of the District Court held at Asheville in said district, counsel for petitioner appeared before the Judge who tried the case and requested him to fix a time and place when he would settle and sign the bill of exceptions;" and that "the said judge did then state to counsel that he would fix the time and place for the settlement of the bill of exceptions and would inform the district attorney and counsel for respondents of the same;" and that "almost at once thereafter counsel for the petitioner gave notice to the United States District Attorney of this application having been made to the Judge and of his promise to settle the bill of exceptions, when the district attorney expressed his willingness to the arrangement and assented to the same."

Prosecution Estopped to Move to Dismiss

The petitioner, plaintiff in error, insists that, under the circumstances and upon the undisputed facts, the prosecution was estopped to move to dismiss the writ of error.

The natural and necessary effect of the agreement made and entered into by the District Attorney with the attorneys of the petitioner, at the instance of the judge, delaying the settlement of the bill of exceptions until after the expiration of six months from the entry of judgment, was to induce the belief on the part of counsel for the plaintiff in error that time was not of the essence and that the petition for writ of error and assignment of errors might thereafter be filed and the writ of error thereafter be issued.

In Vol. 2 Ency. Plead. and Prac., 246, Chief Justice Clark says: "ESTOPPEL.—The general principle that a party cannot take advantage of his own wrong applies to appellate procedure and where the appellant fails to take an appeal within the statutory period, relying upon the express agreement of the appellees, or is prevented by his misconduct, the appellee cannot rely upon such failure to have the appeal dismissed.

"NEGLECT OF OFFICIALS.—The appellant cannot moreover, be held responsible for the failure of public officials to perform their duties. Where he has tried to comply in good faith with all the obligations imposed by the law regulating appellate procedure, he will not lose his appeal because the misconduct of an official prevents his affecting it in time. In such cases the Appellate Court may order it done *nunc pro tunc*," citing numerous authorities in notes 3 and 4. In note 4 it is stated that "Where, accordingly, the appellant takes his appeal as soon as circumstances will permit after the expiration of the period of such delay or suspension, it will be held valid." It should be noted that the petitioner applied on the first day of the next term of the Court of Appeals for the writ of *mandamus*.

If it was the purpose of the District Attorney to take advantage of the lapse of time, he should at the time of

agreeing that the Judge might thereafter notify counsel of time and place of settling the bill of exceptions, have so stated to counsel. He should not have lulled them to sleep by his silence. It must be seen that, by reason of this agreement, counsel for the plaintiff in error did not prepare or file the petition for writ of error accompanied by such an assignment of errors as they could have made. When his Honor, the Judge below, after making the order found in the record and above referred to, had given notice to counsel representing the respective parties to appear before him to settle the bill of exceptions, the District Attorney, for the first time, objected because six months had elapsed after the entry of judgment. He had permitted, *consented to*, the delay in settling the bill of exceptions, and it will not be denied, we think, that at the time he gave his consent to such delay, he knew that counsel were waiting for settlement of the bill of exceptions to file petition for the writ of error, yet "As a sheep before her shearers is dumb, so he openeth not his mouth."

In the interest of justice, for the maintenance of right, that a grievous wrong may be undone, we respectfully urge that the Court permit a hearing of this case upon its merits. The Government of the United States cannot insist upon placing upon the defendant a burdensome and grievous wrong. The Government of the United States has neither malice nor revenge to gratify, but only seeks to do the right.

BURWELL & CANSLER.
WM. P. BYNUM, JR.,
THOMAS SETTLE,
J. E. ALEXANDER,
MOORE & ROLLINS,
Attorneys for Petitioner.

Office Supreme Court, U. S.
FILED
NOV 16 1908
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. [redacted]. 26.

OLD NICK WILLIAMS COMPANY, PETITIONER,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PETITIONER.

MOORE & ROLLINS,
BURWELL & CANSLER,
WILLIAM P. BYNUM, JR.,
Attorneys for Petitioner.

CHARLES A. MOORE,
Of Counsel.

(20,904.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 205.

OLD NICK WILLIAMS COMPANY, PETITIONER,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE PETITIONER.

Statement of the Case.

The Old Nick Williams Company, petitioner, a corporation duly created and existing under the laws of North Carolina and engaged in the business of rectifying distilled spirits at Williams, Yadkin County, N. C., together with N. Glen Williams, its president, and D. E. Kennedy, its employee and manager, were jointly indicted in fifteen counts for violation of the internal revenue laws of the United States while engaged in the business of rectifiers of distilled spirits and distillers, as appears from the indictment on page 6 of the record. The charter or articles of incorporation of the company appear on pages 86-89 of the record.

The court submitted to the jury only the first, fourth, twelfth, thirteenth, and fourteenth counts, all of the others having been stricken out or nolleprossed, as appears on pages 75, 83, 84, and 85 of the record. On the counts submitted to them the jury found the Old Nick Williams Company, Incorporated, guilty of the charge in the first count of the indictment, acquitting N. Glen Williams, its president, and D. E. Kennedy, its employee and manager. On the four remaining counts submitted for their consideration the jury returned a verdict of not guilty as to all the defendants named therein. (See pages 16 and 17 of the record.)

Counsel for the Old Nick Williams Company at once filed a motion in arrest of the judgment on the ground that the charge in the first count of the indictment, being against the corporation and its president and manager jointly, charging them with the commission of a crime involving a specific evil and corrupt intent, namely, the intent to defraud the United States of the tax upon spirits rectified by them, and the president and manager, Williams and Kennedy, thus jointly charged with the corporation, being acquitted, the corporation, which could act only through its officers and agents, could not be held guilty; and on the further ground that inasmuch as the charge against the corporation is one involving as an essential element the specific evil and corrupt intent to defraud, the corporation cannot be convicted of a crime involving such intent, nor can the punishment prescribed for the offense of which the company was convicted be imposed upon a corporation. This motion was overruled by the court and exception was duly taken.

Counsel for the company also moved to set aside the verdict against the company on the first count, which motion was likewise overruled and exception taken.

Upon motion of the attorney for the United States the court pronounced judgment against The Old Nick Williams Company, Incorporated, imposing upon it a fine of $5,000 and the costs of the action, to which judgment counsel for the company duly excepted.

At the same time an order was made by the court allowing the counsel for the company ninety days in which to prepare and serve their bills of exception and assignments of error and the United States attorney thirty days thereafter to prepare and serve his exceptions thereto, after which, as appears in the order, "his honor will settle the bills of exception upon ten days' notice to the attorneys of the parties, and when said bills of exception are filed they may be deemed as made in apt time." This was on the 28th day of November, 1905 (pages 16 and 17 of the record).

January 17, 1906, an order was made by consent extending the time for filing the bills of exception to March 15, 1906, and on February 28, 1906, by agreement of counsel, the defendant company was given until April 1, 1906, to file bills of exception and the United States given the same time thereafter as allowed in a former order, namely, thirty days to file exceptions thereto; all of which when done should be deemed and taken as done at the trial term of the cause and in apt time, and it was ordered by the court accordingly. On June 26, 1906, the trial judge made an order enlarging and extending the time for docketing and filing the record in the Court of Appeals until September 1, 1906 (pages 17, 18 and 19 of the record).

On July 27, 1906, the trial court made an order, set forth in full on page 20 of the record, reciting the fact that the defendant company had filed with the clerk of that court within the time required by the order of the court its bills of exception, to which the attorney for the United States had filed certain objections and amendments, and that the bills of exception had not been settled, signed and sealed by the court within six months from date of the entry of judgment therein; and the court being of opinion that the company was entitled under the circumstances to have its bills of exception settled and the writ of error and citation issued and served *nunc pro tunc* as within the time required by law, ordered the parties or their attorneys to appear before the

court at chambers in Greensboro August 7, 1906, when the bills of exception would be settled and signed and sealed by the court.

It was further ordered that when the bills of exception should have been settled by the court and petition for the writ of error and assignments of error filed by the defendant company, a writ of error and citation in due form should be issued and served, all of which should bear date as of April 15, 1906, "said date being the date on which said defendant filed its proposed bills of exception with the clerk herein and within the period of six months from the date of the entry of the judgment herein aforesaid" (page 20 of the record).

This order was signed by the trial judge and notice issued to the attorneys of the respective parties, and the attorney for the United States excepted to that part of the order directing a writ of error to be issued after the lapse of six months from the entry of the judgment in the case, and the exception was allowed by the court (page 20 of the record).

The bills of exception were settled and the order allowing the writ of error was made and signed by the trial judge on September 12, 1906, and an order made that the writ of error and citation when issued should bear date April 15, 1906, as theretofore ordered by the court. To this order allowing the writ of error and to the issuing of the writ itself, as will appear on pages 259 and 260 of the printed record, no exception was made or taken by the attorney for the United States.

The Statute.

The statute on which the first count is based and for a violation of which the Old Nick Williams Company was convicted is the second paragraph of section 3317 of the Revised Statutes of the United States, and is as follows:

"Every person who engages in, or carries on, the business of a rectifier with intent to defraud the United States of the tax on the spirits rectified by him, or any part thereof, or with

intent to aid, abet, or assist any person or persons in defrauding the United States of the tax on any distilled spirits, or who shall purchase or receive or rectify any distilled spirits which have been removed from a distillery to a place other than the distillery warehouse provided by law, knowing or having reasonable grounds to believe that the tax on said spirits, required by law, has not been paid, shall, for every such offense, be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than two years."

Specification of Errors Relied Upon.

I.

The refusal of the court to give the following special instruction asked by the defendant, being special request numbered 5: "Upon all the evidence in this case the court instructs the jury to find the defendant, The Old Nick Williams Co., not guilty of the charge contained in the first count in the bill," and in charging the jury as follows:

"If, therefore, gentlemen, you are satisfied from the testimony beyond this reasonable doubt which I have called to your attention, that the Old Nick Williams Co., this corporation, acting through its president or its other various agents, violated the laws which I have called to your attention, then the company would be guilty. If that company and its corporate authority were used by any of its various agents in the conduct of the business which it had undertaken for the purpose of violating these laws, then the corporation is guilty. The company was authorized as a corporation to carry on the business of a rectifier, and although the president had no knowledge of it, yet if the other agents of the company used the name and the business rights of the company to defraud the government of the United States, the company would still be guilty, although it may have been done without the knowledge and consent of its chief officer, because the other agents, the other directors, the other managers, would be equally competent to involve the company by their acts in the commission of a criminal offense."

II.

The admission by the court of the testimony of W. H. Chapman, a revenue agent, and of the other persons with him, to the effect that he and they, acting under the directions of the prosecuting attorney, had been sent to the distillery in the town of Williams, Yadkin County, N. C., then operated under a license issued to D. C. Foster, and being the same formerly operated under a license issued to the defendant Kennedy, and conveyed by the Old Nick Williams Company to Kennedy on the 1st day of February, 1903, and by Kennedy to Foster on May 9, 1905, for the purpose of making a test of its producing capacity from a given quantity of grain or a given quantity of meal, and that the said Revenue Agent Chapman and the others with him, while at the distillery making such inspection and tests, took the same into their possession and distilled the beer from the meal then collected in two of the fermenting tubs in the said distillery and that by distilling in the distillery the beer collected in the two fermenters therein, the test showed that four and one-half gallons of spirits were produced by the distillery from each bushel of grain used therein.

III.

The refusal of the court to give the following special instruction asked by the defendant, numbered 98, to wit:

"The jury is instructed to consider the evidence of the test made at the distillery under the direction of Col. Chapman during the trial of this case only for the purpose of showing or tending to show the capacity of said distillery to produce distilled spirits from a given quantity of grain or material, as throwing light upon the question as to whether the defendants or either of them operated said distillery during the time referred to in the indictment with intent to defraud the government. And the jury is instructed, in passing upon the question, not to consider the evidence of the

government witnesses, tending to show that more than the authorized quantity of meal was used in producing the beer from which the test was made, as that fact, if proved, could not have any bearing whatever upon any charge in the indictment, as there is no evidence in this case tending to show that the defendants or either of them, were responsible for the operation of the said distillery at or immediately before said tests were made."

IV.

The refusal of the court to give the following special instruction asked by the defendant, numbered 99, to wit:

"Unless the jury shall be satisfied beyond a reasonable doubt that the distillery which was used by Revenue Agent Chapman and others on the second inst. for the purpose of testing its capacity, and which was thus being run in the name of D. C. Foster, was not the property of the said Foster, but in reality the property of the defendants and operated by them, then the court charges the jury that they can only consider the evidence of said test for the purpose of showing the number of gallons of spirits which might be distilled from a given quantity of beer, as contained in the two fermenting tubs used in making said test, and they will not consider any evidence of the conditions and surroundings of said distillery at the time the test was made which do not appear to have existed when the same was operated in the name of D. E. Kennedy, for the purpose of proving or tending to prove, that the said distillery was operated by the defendants for the purpose of defrauding the government of the tax upon the spirits distilled thereat, as charged in the twelfth count of the indictment. In other words, unless the said distillery was owned and being operated by the defendants at the time the test was made, the evidence of the government witnesses tending to show that more than one hundred and one bushels of grain were used in making the mash in the fermenting tubs used in making said test, cannot be considered by the jury in passing upon the guilt or innocence of the defendants in this case. Neither would the acts and declarations of the distiller and others engaged in operating the said distillery at that time be competent evidence against the defendants in this case, unless the jury should be satisfied

that the said distillery was then being operated by the defendants and not by the said Foster."

V.

The refusal of the court to give the following special instruction asked by the defendant, numbered 101, to wit:

"The court instructs the jury as a matter of law that these defendants or either of them cannot be held responsible for the acts, conduct and declarations of those in charge of the operation of the distillery being run in the name of D. C. Foster at and before the test was made by Revenue Agent Chapman on the second instant, as it is not denied that at and prior to that time, the defendants Williams and Kennedy were absent in attendance upon this court, and there is no evidence in the case that the persons so in charge of said distillery were the agents of the defendants or either of them or authorized by them to do or say the things testified to by the government's witnesses. Therefore the court charges the jury, in passing upon the guilt or innocence of these defendants, not to consider the evidence of the acts, conduct and declarations of the persons so in charge of said distillery at and before said test was made."

VI.

The refusal of the court to give the following special instruction asked by the defendant, numbered 102, to wit:

"The evidence of the government's witnesses as to the result of the test made by them at the distillery on the second instant, and of the acts, conduct and declarations of those engaged in operating said distillery at that time, if competent at all, can only be considered by the jury in passing upon the offense charged in the twelfth count in the indictment, and the jury will not in any event consider it for any other purpose."

VII.

The refusal of the court to give the following special instruction asked by the defendant, numbered 106, to wit:

"In the first, ninth, tenth and twelfth counts of the indictment, the defendants are charged with doing the acts therein

alleged with intent to defraud the United States of its tax. This intent is a necessary ingredient and element of the crimes charged in said counts. It is this intent to defraud the United States of its tax which makes the guilt of the defendants, and in the absence of such intent there is no violation of the act of Congress prohibiting the doing of the things which are charged in the said counts. This intent is the essence and an essential element in the crimes charged in the said counts and denounced by law."

VIII.

The refusal of the court to give the following special instruction asked by the defendant, numbered 107, to wit:

"The jury cannot, therefore, presume that the defendants, or any of them, are guilty upon the first, ninth, tenth and twelfth counts even should they find that they did the acts charged in the said counts. It is incumbent upon the government in this case to go further and satisfy you fully and beyond a reasonable doubt that they did those acts charged in the said counts with a wrongful intent to injure and defraud the United States of its tax, as charged in said counts."

IX.

The refusal of the court to give the following special instruction asked by the defendant, numbered 110, to wit:

"The first count in the bill of indictment charges the defendants, the Old Nick Williams Company, a corporation, N. Glenn Williams and D. E. Kennedy, with having power and authority to engage in and carry on the business of a rectifier of distilled spirits and that they did, being then and there engaged in and carrying on the business of a rectifier of distilled spirits, engage in and carry on the same with intent to defraud the United States of the tax upon the spirits rectified by them. The burden is upon the government to show all the material elements of the crimes charged against the defendants, and the government must show this to the satisfaction of the jury and beyond a reasonable doubt. It must show, first, that they did engage in and carry on the business of rectifiers of distilled spirits with power and

authority derived from the government to do so. Second, it must so satisfy the jury that they so engaged in and carried on the business of rectifiers of distilled spirits with the wrongful intent to defraud the United States of the tax upon the spirits rectified by them. It is not the mere engaging in or carrying on the business of a rectifier which makes the defendants guilty. It is the wrongful intent to defraud the United States of its tax which makes the guilt, and if the jury should find from the evidence and beyond a reasonable doubt that the defendants did have power and authority to engage in and carry on the business of a rectifier of distilled spirits and that they did engage in and carry on such business, but they should fail to be satisfied from the evidence beyond a reasonable doubt that the defendants had such wrongful and fraudulent intent in so engaging in and carrying on the said business, the jury would return a verdict of not guilty against them on said count."

X.

The refusal of the court to give the following special instruction asked by the defendant, numbered 123, to wit:

"The evidence in this case discloses the fact that at the time referred to in the bill of indictment the defendant, the Old Nick Williams Company, was engaged in and carrying on the business of a retail liquor dealer and had paid the government the special tax imposed by law upon said business. This being true, the court charges the jury that the Old Nick Williams Company as such retail liquor dealer, had the legal right to purchase wholesale packages of spirits duly stamped and place the same in its retail establishment without making entries of such purchase upon the wholesale or rectifying books which the government required the said company to keep in connection with its business as a wholesale liquor dealer or rectifier of distilled spirits. The Old Nick Williams Company also had the right as such retail liquor dealer to draw off from such wholesale packages so purchased by it and placed in the retail establishment retail packages or packages of less than five gallons and to sell the same without entering such transaction upon any books required by law to be kept by it as a wholesale liquor dealer or rectifier of distilled spirits. And unless the jury shall be satisfied beyond

a reasonable doubt from the evidence that the defendants did not draw off the retail packages of spirits which were shipped by the Old Nick Williams Company from wholesale packages purchased by it as a retail liquor dealer, but in fact drew off the said retail packages or some of them from its rectified or wholesale packages which had been purchased by it for or charged by it to retail or obtained them from non-tax paid packages otherwise acquired, then the jury could not convict the defendants of any of the offenses charged in the bill of indictment, unless the government has satisfied you beyond a reasonable doubt of their guilt upon evidence other than that of the mere sales of retail packages of spirits in quantities in excess of the amounts which appear upon the wholesale or rectifying books of the Old Nick Williams Company to have been disposed of by it."

And in charging the jury as follows:

"GENTLEMEN OF THE JURY: The court inadvertently overlooked a matter which is involved in this case, and which is insisted upon by the District Attorney, as an evidence of guilt, and which, on the other hand, the defendants' counsel insist is not a requirement, and that is, the regulation issued by the Commissioner of Internal Revenue in regard to the duty of a wholesale liquor dealer to keep a record when he joins his business with that of a retail dealer.

"The court will charge you that such a regulation is a reasonable regulation. The commissioner has a right to make such a regulation, but the violation of the regulation does not constitute a criminal offense, because the commissioner has no right, even with the approval of the Secretary of the Treasury, to make a regulation, the violation of which would constitute a crime, but he has a right to make the regulation with a view to affording a check upon such persons as engage in both the wholesale and retail business of liquor dealers together; that is, where a person being a wholesale liquor dealer takes out license to carry on the business of a retail liquor dealer, or *vice versa*, and carries it on in the same place, on the same premises, then it is reasonable for the commissioner to say that the wholesale dealer, being at the same time a retail dealer, should enter upon his books all packages brought in, and transferred to his retail business. The court also charges you that the failure of a wholesale dealer, who is also a retail dealer, to keep this record may be

considered by the jury as evidence tending to support the theory of the government, if in fact, you find that he failed to keep it. This is about all there is of that. It was argued by counsel for the defendants that it did not constitute a crime, and the court is in accord with that view. But if the government has shown that there went into the wholesale establishment quantities of spirits bought from other places but not entered upon the retail books of the company that may be considered by the jury as a circumstance in connection with other circumstances tending to show unlawful purpose."

XI.

The refusal of the court to give the following special instruction asked by the defendant, numbered 124, to wit:

"In other words, before the government can convict the defendants or either of them of any of the offenses charged in the bill of indictment upon the evidence that the Old Nick Williams Company had from time to time sold large quantities of retail packages of spirits in excess of the amounts which it had theretofore caused to be charged off to retail and upon its wholesale or rectifying books required by the government to be kept by it, the jury must be satisfied beyond a reasonable doubt that the retail packages so sold were in fact not liquors purchased by the said company in its capacity as a retail liquor dealer, in duly stamped wholesale packages, but that the said retail packages so sold and shipped had been drawn off from its wholesale or rectified packages which had not been charged off to retail, or were packages otherwise acquired contrary to law and upon which the tax had not been paid."

XII.

The refusal of the court to give the following special instruction asked by the defendant, numbered 125, to wit:

"The court has permitted the prosecution to introduce evidence tending to show amounts of spirits sold and shipped by the defendant, the Old Nick Williams Company. This evidence by itself is not sufficient to justify the jury in returning a verdict against the defendant or any of them.

If the jury should find from this evidence that the defendant, the Old Nick Williams Company, sold or disposed of more distilled and rectified spirituous liquors than the evidence shows it bought or otherwise obtained, this will not justify you in returning a verdict of guilty."

XIII.

The refusal of the court to give the following special instruction asked by the defendant, numbered 127, to wit:

"The defendants are not required to show how, where, from whom or under what circumstances they obtained the spirits sold by them, but the government must show you, if it becomes material in this case, to your satisfaction beyond a reasonable doubt, that they obtained them in violation of the law."

XIV.

The refusal of the court to give the following special instruction asked by the defendant, numbered 128, to wit:

"The defendants can wait in this case until the government has shown guilt. They are not guilty of a violation of the law simply because they sold more spirituous liquors than the evidence showed they distilled and bought, Kennedy being an authorized distiller, and the company being a rectifier, wholesaler and retailer of the same; nor are they called upon or required to explain how they became possessed of such spirituous liquors."

XV.

The refusal of the court to give the following special instruction asked by the defendant, numbered 132, to wit:

"The fact, if true, that they, the defendants, did sell distilled spirits in a large quantity, does not put any burden upon them to explain or in any way account for their possession thereof."

XVI.

The refusal of the court to give the following special instruction asked by the defendant, to wit:

"Evidence of other transactions than those charged in the various counts of the bill of indictment, upon which the defendants are now being tried, can only be considered by the jury in so far as such evidence may tend to show the motive and intent with which the defendants did the acts charged in the bill of indictment, if they should find that they did such acts at all. Unless such evidence of other acts done by the defendants tend to throw light upon and aid the jury in determining the intent and purpose of the defendants in doing the acts charged against them, if you find they did do such acts at all, you must not give any weight to or consider such evidence of other acts at all. Although the jury may believe that the defendants are guilty of other offenses and violations of the law than those charged against them and that such other transactions about which the witnesses have been permitted to testify, constitute such offenses, the jury cannot convict the defendants upon this bill of indictment on the same, and the jury should therefore not confound the defendants' acts and doings which appeared in the evidence, detailed as to other transactions than those charged in the bill of indictment, with those acts charged in the bill; for though the jury may believe the defendants guilty of violations of the law other than those charged in the bill of indictment, they will not be justified in finding them guilty in this case for such violations; and the jury is instructed to put out of consideration all the evidence of other transactions and doings of the defendants or any of them, no matter how wrongful and unlawful the same may appear to the jury to be unless such transactions and doings tend to show the wrongful intent of the defendants in doing the acts charged in the bill of indictment."

XVII.

The refusal of the court to give the following special instruction asked by the defendant, numbered 172, to wit:

"According to the undisputed evidence in this case, the Old Nick Williams Company, at the time mentioned in the

bill of indictment, was by permission of the government, engaged in carrying on the business of a wholesale liquor dealer, the business of a rectifier of distilled spirits, and the business of a retail liquor dealer, and had paid the special taxes required by the government to be paid for the privilege of carrying on each of said businesses. Under these circumstances it became the duty of the Old Nick Williams Company, when it purchased a package of distilled spirits in its capacity as a wholesale liquor dealer or a rectifier, which was to be used by it in its wholesale or rectifying business, to enter said transaction upon its wholesale or rectifying books prescribed by the Commissioner of Internal Revenue for that purpose, and to also enter upon said books such other information as the said commissioner required, including the fact of the sale of such package, when sold, to whom sold, and also to make due report of said transaction to the collector of the district upon forms provided by said Commissioner of Internal Revenue. But the law did not require the Old Nick Williams Company as retail liquor dealer to make or keep such record of packages of distilled spirits purchased by it for the purpose of being used and which were used by it, in its business as a retail liquor dealer, and as such retail liquor dealer it had the right, common to all retail liquor dealers, to purchase wholesale packages which were duly stamped in such numbers and amounts as it might see fit, from licensed wholesale liquor dealers or distillers, without making any record whatever of said transaction or reporting the same to the collector or other government official. It also had the right, as such retail liquor dealer, to purchase retail packages or packages under five gallons, from a retail and wholesale liquor dealer, in such quantities as it might desire, or to purchase retail packages in quantity not exceeding 20 gallons, from any person though not a licensed wholesale or retail liquor dealer, without making any record of any such transaction or reporting the same to the collector or other government official. This being the law, the court charges you that although you should be satisfied from the evidence that the Old Nick Williams Company did sell quantities of spirits in retail packages greatly in excess of the amounts shown by its wholesale or rectifying books to have been charged off to its retail business, yet the fact that it did sell said quantities of liquor in retail packages in excess of the amount so shown to have been

charged off to the retail business, is not sufficient evidence to warrant the jury in finding beyond a reasonable doubt that the liquor so sold was sold by the defendants or either of them in violation of law, or that they or either of them are guilty of the offenses charged in the several counts in the bill of indictment, because the liquor thus sold may have been purchased from persons other than those shown by the wholesale or rectifying books of the Old Nick Williams Company for use in its business as a retail liquor dealer."

And in charging the jury as follows:

"GENTLEMEN OF THE JURY: The court inadvertently overlooked a matter which is involved in this case, and which is insisted upon by the district attorney as an evidence of guilt, and which on the other hand, the defendants' counsel insist is not a requirement, and that is the regulation issued by the Commissioner of Internal Revenue in regard to the duty of a wholesale liquor dealer to keep a record when he joins his business with that of a retail dealer.

"The court will charge you that such a regulation is a reasonable regulation. The commissioner has a right to make such a regulation, but the violation of the regulation does not constitute a criminal offense, because the commissioner has no right, even with the approval of the Secretary of the Treasury, to make a regulation, the violation of which would constitute a crime, but he has a right to make the regulation with a view to affording a check upon such persons as engage in both the wholesale and retail business of liquor dealers together; that is, where a person being a wholesale liquor dealer takes out license to carry on the business of a retail dealer, or *vice versa*, and carries it on in the same place, on the same premises, then it is reasonable for the commissioner to say that the wholesale dealer, being at the same time a retail dealer, should enter upon his books all packages brought in, and transferred to his retail business. The court also charges you that the failure of a wholesale dealer, who is also a retail dealer, to keep this record may be considered by the jury as evidence tending to support the theory of the government, if in fact, you find that he failed to keep it. This is about all there is of that. It was argued by counsel for the defendants that it did not constitute a crime, and the court is in accord with that view.

But if the government has shown that there went into the wholesale establishment quantities of spirits bought from other places but not entered upon the retail books of the company that may be considered by the jury as a circumstance in connection with other circumstances tending to show unlawful purpose."

XVIII.

The refusal of the court to give the following special instruction asked by the defendant, numbered 98, to wit:

"183. All the counts in the bill of indictment charge that all the various offenses were committed jointly by the defendants. It is necessary that the prosecution should prove to the satisfaction of the jury and beyond a reasonable doubt that such offenses were so jointly committed, as charged, before they can convict the defendants on any of them. Therefore, even should the jury find that the offenses charged were committed by one or two of them, but that the other defendants did not participate or join in the commission of the offense, the jury will acquit all the defendants."

XIX.

The refusal of the court to grant the motion of the defendant, the Old Nick Williams Company, in arrest of judgment upon the grounds stated in the bills of exception.

XX.

The refusal of the court to grant the motion of the defendant, the Old Nick Williams Company, for a new trial of this case because of the errors alleged and set forth in the bills of exception herein.

ARGUMENT.

I.

The first question presented in this case is whether the plaintiff in error, the Old Nick Williams Company, a corporation, can be held guilty of the crime charged in the first count of the indictment, the only count upon which the corporation or any of the defendants in the indictment was convicted. That count charges "that the Old Nick Williams Company, Incorporated, a corporation duly incorporated under the laws of North Carolina, with power and authority to engage in and carry on the business of a rectifier of distilled spirits, * * * N. G. Williams and D. E. Kennedy, did then and there unlawfully and wilfully engage in and carry on the business of rectifier of distilled spirits, with intent to defraud the United States of the tax upon the spirits so rectified by them" (page 6 of the record). It will be observed that this count charges not an act of nonfeasance nor merely an act of misfeasance, but it charges the corporation and its president and manager jointly with the commission of a crime, the very essential element of which is the intent to defraud the United States. Mr. Williams and Mr. Kennedy, the president and manager of the corporation, charged jointly with it in this count, were not convicted. They were discharged. Only the corporation was found guilty, and it upon this count only (pages 16 and 17 of the record).

The question as to the liability of the corporation to conviction on the charge preferred in the first count is directly raised by its motion in arrest of judgment on page 17 of the record and by the special instruction asked by it, numbered 5, appearing on page 22 of the record, by assignments of error numbers I and XXV appearing on pages 234 and 257 of the record, and by the specifications of error relied upon in this brief numbered I and XVIII.

It is not contended by the plaintiff in error that a corporation cannot be convicted of any criminal offense. We concede that it is well settled that a corporation is indictable and may be convicted for acts of non-feasance or misfeasance involving no specific criminal intent. Thus, in ***People vs.*** *Albany*, 11 Wendell, 539, *Commonwealth vs. Proprietors*, etc., 2nd Gray, 339, and other cases, it was held that a corporation is indictable for nuisance; in *State vs. Passaic County A. G. L. Society*, 54 N. J., 260, it is held that a corporation is indictable for keeping a disorderly house; and in *State vs. Western North Carolina R. R. Co.*, 95 N. C., 602, it is held that a corporation is indictable and may be convicted for obstructing a public highway. But in all these and similar cases where corporations have been held indictable for crime, the offenses were merely for the breach of some duty or for doing some forbidden act where no specific evil or corrupt intent was involved. Such cases are, therefore, no authority for the contention that the plaintiff in error may be convicted of the crime charged in the first count of the indictment in this case, a crime which not only involves a specific evil and corrupt intent, but which cannot be committed in the absence of the existence of that intent in the mind of the person charged. That intent is a criminal intent, the "intent to defraud the United States of the tax upon the spirits so rectified by them." The crime charged against the corporation and its president and manager in the count on which the corporation was convicted is not the mere engaging in and carrying on the business of a rectifier of distilled spirits—that is a perfectly lawful business when engaged in with the license and permission of the United States. The crime, *the very essence of the offense*, is the carrying on of that business with the specific intent named in the indictment, that is, the evil and corrupt intent to defraud the United States of the tax upon the spirits so rectified by them.

Can a corporation commit such an offense? Being a purely artificial entity, acting only through its directors,

officers and agents whose authority is limited to acts within the scope of its charter and the charter itself not authorizing the doing of any unlawful act, is the corporation, the artificial person, capable of entertaining such specific intent? Can it be held liable for any act, the criminality of which is dependent upon the intent with which the act is done? We contend that it cannot.

This has been expressly held in North Carolina, as well as in numerous cases in other States. In *State vs. Western North Carolina R. R. Co.*, 95 N. C., 602-610, the defendant company was indicted for obstructing a public road in Buncombe County and was held to be indictable for that offense and was found guilty and punished by fine. But in deciding the case the court expressly declares that while corporations may be capable of committing such an offense as was charged in that case, they are "not capable of committing offenses, a necessary quality or ingredient in which is the criminal intent" (citing *Angell and Ames on Corporations*, sections 394-396; *Morawetz on Private Corporations*, section 94; 1 *Bishop's Criminal Law*, section 505).

Mr. Morawetz, thus cited by the court, in his work on Private Corporations, second edition, volume 2, section 732, pages 701-702, discusses this question very fully. Among other things he says:

"But public policy certainly does not demand that a person or association should be punished by the State through criminal proceedings on account of a wrong committed by another. This would be contrary to the natural sense of justice. Hence it is held that where the commission of a crime involves the intention of the offender this intention cannot be imputed by means of a fiction; *actual intention is required*. It follows, therefore, that a corporation cannot be charged criminally with a crime involving malice or the intention of the offender. *Even though the corporators themselves should unanimously join, with malice aforethought, in committing a crime as a corporate act, yet the malice would be that of the several members of the company, and not actually one malicious intention of the whole company*" (citing *Cumberland Canal Company vs. Portland*, 56 Me.,

77; *Androscoggin Water Company vs. Bethel Mill Company*, 64 Me., 441; *United States vs. Baltimore*, etc., *R. R. Co.* (U. S. C. C.), 7 Amer. Law Register, n. s., 757).

The same doctrine is declared in *Thompson on Corporations*, volume 7, section 8398; 1 *Cook on Corporations*, 5th edition, pages 76-77, section 15*b*, where it is declared that "since corporations are not in themselves capable of an evil intent, they can be indicted only for such offenses as arise from misfeasance or for non-feasance, such as an omission to perform a legal duty or obligation."

In the case of the *Commonwealth vs. Proprietors*, 2nd Gray (Mass.), 339, the court declares the principle in this language:

"Corporations cannot be indicted for offenses which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects. They cannot be guilty of treason or felony, of perjury or offences against the person. But beyond this there is no good reason for their exemption of unlawful and wrongful acts committed by their agents in *pursuance of authority derived from them*."

The same principle is announced in *Clark's Criminal Law*, pages 78-80, where all the cases bearing upon the subject are cited.

The doctrine is nowhere more clearly stated that in *McClain on Criminal Law*, 1st edition, volume 1, section 184, page 146, where it is said:

"As a corporation can only act through its directors, officers and agents, whose authority is limited to acts within the scope of the charter, and as a charter could not authorize directly the doing of an unlawful act, it is evident that there is a large class of crimes, including perhaps all the common-law felonies, that cannot be committed by a corporation because criminality is dependent upon the intent with which the criminal act is done. If murder, larceny or assault and battery are committed by the officers or agents of the corporation, even though in the prosecution of the corporate business,

such acts are the individual acts of the officers or agents and not the acts of the corporation, *it being impossible that such acts could have been authorized*, being necessarily *ultra vires*. Thus, to render a corporation criminally liable, it must appear that the act was one authorized by the company and not the mere unauthorized act of the officer or agent. If a statute imposes a penalty for knowingly and wilfully doing an act which the statute declares wrongful, as for instance, wilfully converting the property of another or knowingly employing children under a certain age in manufacturing establishments, it is not to be deemed to be directed against corporations, but against their officers or agents, who alone can knowingly and wilfully do the prohibited act."

The author cites a great number of authorities in support of this doctrine.

Clark and Marshall, in their work on Private Corporations, announce the principle as follows:

"In general, a corporation is liable to indictment for a common law or statutory crime whether it consists of nonfeasance or misfeasance, provided it does not involve the element of personal violence or the element of malice or actual criminal intent, and provided the prescribed punishment may be inforced on a corporation. There is some authority for saying that it may be indicted for an offense involving the element of personal violence or malice, but this is doubtful. A corporation cannot be indicted for felony, because if for no other reason, it cannot be imprisoned and therefore cannot be subjected to punishment for felony."

Clark and Marshall's Private Corporations, vol. 2, 648.

"Even if it be conceded that a corporation has the capacity to commit a particular crime, it cannot be indicted therefor if the punishment prescribed for the crime cannot be enforced upon a corporation. A corporation therefore could not be indicted for a felony because if for no other reason, the punishment for felony is death or imprisonment, to neither of which penalties a corporation can be subjected."

Clark and Marshall's Private Corporations, vol. 1, section 251, p. 656.

"A corporation cannot in general be indicted for ordinary crimes and misdemeanors, such as involve a criminal or an

immoral intent, and such as are often grouped in books of the common law under the three-fold designation of Treason, Felony or Breach of the Peace."

15 *Cyc.*, p. 1231.
People vs. Dunlop, 66 N. Y. S., 161.
People vs. Leadworks, 9 L. R. A., 720-722.
Canal Co. vs. Commonwealth, 100 Am. Dec., 570.
State vs. Mfg. Co., 37 Am. Dec., 38.
Ore vs. Bank, 13 Am. Dec., 588.
Century Digest, page 3152.
State vs. Patton, 4 Ired., 16.
Benson vs. Monson Co., 9 Metcalf, 562.
Clark on Corporations, p. 199.
A. & E. Ency., 2nd ed., vol. 7, p. 844.

The question is fully discussed in *Wharton's Criminal Law*, volume 1, 9th edition, section 91, page 120, and the notes on pages 121, 122 and 123. On page 121 Mr. Wharton says that "Lord Holt is reported in an anonymous case to have laid it down generally that a corporation is not indictable at all, though its individual members are. But this general proposition of Lord Holt has, however," says Mr. Wharton, "received considerable qualification in modern times, and is now limited to cases of felonies, assaults, riots and malicious wrongs." "We may therefore," says he, "hold that a corporation may be indicted for a breach of duty imposed on it by law, though not for a felony or for public wrongs involving personal violence, as riots or assaults." And he instances cases of indictment for failing to repair a road, or a bridge or a wharf, and breaches of duty of that kind involving no specific evil intent.

In a note on page 121 he quotes from the case of the *State vs. The Great Works Co.*, 20 Me., 41, where Weston, C. J., states the law thus:

"A corporation is created by law for certain beneficial purposes. It can neither commit a crime nor misdemeanor by any positive or affirmative act, or incite others to do so, as a corporation. While assembled at a corporate meeting, a majority may by vote, entered upon their records, require an

agent to commit a battery; but if he does, it cannot be regarded as a corporate act for which the corporation can be indicted. It would be stepping aside altogether from their corporate powers. If indictable as a corporation for an offense thus indicated by them, the innocent dissenting minority would become equally amenable to punishment with the guilty majority. Such only as take part in the measure should be prosecuted either as principals, or as aiding and abetting, or procuring an offense to be committed, according to its character or magnitude."

On the authorities above cited, we submit that it is plain that the plaintiff in error cannot be convicted of the crime charged in the first count of the indictment. The officers and agents of the company might be convicted upon satisfactory proof of the offense there charged, but it is to be observed that those officers who were jointly indicted with the plaintiff in error in that count, namely, the president and manager, the only officers or agents of the company shown by the evidence to have had any participation whatever in the management and control of the affairs of the corporation, were not found guilty by the jury, though they were specifically charged in the same count with the corporation as having committed the offense. They were discharged, that is, the jury failed to convict them. That being true, it is inconceivable, we respectfully submit, that the corporation, the artificial entity, should be held guilty of entertaining the specific intent charged, while the natural persons, namely, the president and manager, who alone directed and controlled the affairs of the corporation and carried on the business described in that count, were not convicted of anything.

We submit, therefore, that the special instruction numbered 5, asked by the plaintiff in error, should have been given to the jury; that His Honor erred in his charge to the jury upon that point as set forth in the bill of exception relating to this point, and that the motion in arrest of judgment should have been sustained and the plaintiff in error discharged, which would put an end to the case so far as the corporation is concerned.

II.

If, however, this court should hold against the plaintiff in error on the first question presented, which has been discussed above, then it is contended in behalf of the plaintiff in error that a new trial should be granted on account of errors appearing in the record and which are specified in this brief as errors relied upon. The second, third, fourth, fifth and sixth of these specifications relate to the admission of the evidence of Revenue Agent Chapman and others in regard to testing the capacity of the distillery of D. C. Foster of Williams, Yadkin County, North Carolina, in which the United States claimed on the trial that the plaintiff in error and N. G. Williams and D. E. Kennedy were interested as owners. This distillery and premises had been sold and conveyed by the Old Nick Williams Company to D. E. Kennedy February 1, 1904, as appears on page 175 of the record, and by D. E. Kennedy and wife to D. C. Foster on May 9, 1905, as appears from pages 171 and 172 of the record. The legal title to the property, as was conceded by the government, was in D. C. Foster, but it contended that the Old Nick Williams Company and Williams and Kennedy were its real owners and operators, and in the twelfth count these three were charged with engaging in and carrying on the business of a distiller with intent to defraud the United States of the tax upon the spirits distilled by them. It was by virtue of this twelfth count that Chapman and the others were sent to make the test referred to in the record at page 126. The trial was then in progress and Williams and Kennedy were necessarily in court, forty miles from the distillery, and they were also president and manager of the Old Nick Williams Company, also on trial. The plaintiff in error presented certain requests for special instructions relative to the manner in which the jury should be instructed to consider the testimony of Chapman and the others concerning this test, and these re-

quests are made the basis of bills of exception, assignments of error, and are specifications of error numbered two, three, four, five and six in this brief. The court was particularly requested by special request numbered 102 on page 46 of the record, bill of exception numbered eight on page 198, and assignment of error numbered eight, page 241 of the record, and specification of error numbered six in this brief, to instruct the jury that the evidence of the government's witnesses as to the result of the test made by them at the distillery on the 2nd of November and of the acts, conduct and declarations of those operating the distillery at that time, if competent at all, could only be considered by the jury in passing upon the offense charged in the twelfth count of the indictment and that the jury should not, in any event, consider it for any other purpose. This instruction was refused. Obviously the plaintiff in error and the other defendants in the indictment were entitled to this instruction. The evidence could have no bearing, even conceding the contention of the government, upon any other than the twelfth count in which the defendants in the indictment were charged with operating the distillery with intent to defraud the United States, and the test was made by Chapman in order to secure evidence that the distillery was capable of producing more spirits than had been produced by it while operated by Foster.

Specifications seven, eight, and nine relate to the instructions asked by the plaintiff in error to the effect that on the first count intent was a necessary ingredient and element of the crime there charged and that it was necessary that the jury should find this intent to have existed in the persons there charged beyond a reasonable doubt before they should convict. These instructions were refused, and it is submitted their refusal was obvious error, very prejudicial to the plaintiff in error. It is a plain principle of criminal law that in any offense, the necessary element of which is a specific evil intent, such intent, being a necessary element of the crime, must be found by the jury to exist before a conviction can be

had. The trial court was asked to so instruct the jury, but declined to do so.

McClain on Criminal Law, vol. 1, p. 95.

Specifications of error ten, eleven and seventeen may be treated together and relate to the refusal of the court to give certain requests for instructions as to the law regulating the rights and duties of a retail liquor dealer. It appeared on the trial that the Old Nick Williams Company was a retail liquor dealer, as well as a rectifier and wholesale liquor dealer, and these requests relate to the right of the company to purchase spirits as a retail dealer in wholesale packages and to place the same in its retail establishment and retail spirits therefrom in less than five gallons, without entering such purchase upon any books required by law to be kept by it as a wholesale liquor dealer or rectifier of distilled spirits. The trial court conceded the correctness of these instructions as a matter of law, but told the jury that they might consider the failure of the company to enter such purchase upon its wholesale books "as a circumstance in connection with other circumstances tending to show unlawful purpose."

In this, it is respectfully submitted, there was error. Unlawful purpose to do what? The plaintiff in error was not indicted in its capacity as a retail liquor dealer or a wholesale liquor dealer. Such evidence certainly could not properly be considered by the jury as bearing upon the guilt of the plaintiff in error on the first count, where it is charged as a rectifier. It is respectfully submitted that the instructions asked properly set forth the law in which such evidence should have been considered by the jury, if it should have been considered at all, and the court committed error in refusing to give them and in charging the jury as it did.

Specifications of error twelve, thirteen, fourteen, and fifteen may be considered together. They relate to certain shipments of spirits by the plaintiff in error, and plainly the jury should have been instructed as there requested, in order

that they might have known how and in what way the evidence relating to such shipments should be considered by them. In one of them, namely, the thirteenth specification of error, the court was requested to instruct the jury that the plaintiff in error was not required to show from whom or under what circumstances it obtained the spirits sold by it, but that the government must show the jury that fact, if it was material to the case; and in the fifteenth specification of error the court was requested to instruct the jury that if it was true that the defendants in the indictment did sell distilled spirits in a large quantity, that fact did not put any burden upon them to explain or in any way account for their possession thereof.

These requests were refused, and in their refusal, we respectfully submit, there is reversible error.

The sixteenth specification of error is to the refusal of the court to give the special instructions numbered 169 and 170 on page 61 of the record, appearing in bill of exception numbered 21, page 223, and in assignment of error XXI on page 252, and specification of error numbered 16 in this brief. These instructions relate to the way in which the jury should consider evidence of other transactions than those charged in the indictment, and the court was asked to instruct the jury that unless such evidence tended to throw light upon and aid the jury in determining the intent and purpose of the defendants in doing the acts charged against them, they should not give any weight to or consider such evidence of other acts at all and that although the jury might believe the defendants guilty of other offenses than those charged in the indictment, they should not convict them upon the indictment under consideration on that account. The instructions embody a familiar principle of criminal law, applicable in all cases where the crime involves a specific intent and where evidence of other transactions is received as bearing upon such intent. The instructions clearly should have been given.

Wood vs. U. S., 41 U. S. (16 Peters), 342.

The eighteenth specification of error, being the 183d special instruction requested (page 65 of the record), should have been given by the court. The allegation being that the act charged in the first count in the bill of indictment was jointly committed by the defendants, the jury could not convict the defendant, Old Nick Williams Company, unless they were satisfied from the evidence that the act was committed by them jointly and as charged. The jury found the defendants, N. Glen Williams and D. E. Kennedy, not guilty. In other words, that they did not jointly with the defendant, Old Nick Williams Company, do the unlawful act charged in the first count of the bill. Therefore, the defendant, Old Nick Williams Company, was entitled to the instruction as prayed.

In conclusion it is respectfully submitted in behalf of the plaintiff in error, *first*, that its special instruction numbered 5, to the effect that upon all the evidence in the case, it could not be convicted upon the first count, and that after conviction its motion in arrest of judgment should have been sustained and the plaintiff in error discharged; *second*, that if this should not be done, then the plaintiff in error is entitled to a new trial on account of the errors in the record embraced in its bills of exception and assignments of error and specifically discussed in this brief.

Respectfully submitted,

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No. [redacted] 29.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

OLD NICK WILLIAMS COMPANY, PETITIONER,

v.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

OLD NICK WILLIAMS COMPANY, PETITIONER,
v.
THE UNITED STATES. } No. 205.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

Petitioner was convicted on the 28th day of November, 1905, in the District Court for the Western District of North Carolina, for carrying on the business of a rectifier of distilled spirits with intent to defraud the United States of the tax upon the spirits rectified by it; and upon the same day judgment was pronounced assessing against it a fine of $5,000, and defendant's counsel were allowed ninety days to prepare and serve a bill of exceptions, and the district attorney was allowed thirty days thereafter to prepare his exceptions thereto. (Rec., pp. 9, 16, 17.) On January 17, 1906, it was ordered by consent that the filing of the bill of exceptions be extended to the 15th of March, 1906. (Rec., pp. 17 and 18.)

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On February 28, 1906, it was agreed by the United States attorney and counsel for plaintiff in error that it should have until April 1, 1906, to prepare and file bills of exceptions, and that the United States should have the time thereafter, allowed in the former order (thirty days), to file exceptions. (Rec., p. 18.) This is the last order that was entered by consent of the United States attorney, and if it had been complied with, the bills of exceptions would have been prepared and presented, and the Government's exceptions thereto filed by May 1, 1906, or nearly a month less than six months after sentence was imposed.

On June 26, 1906, "for good cause shown," the time for docketing and filing the record was enlarged and extended until September 1, 1906. (Rec., p. 19.) And on July 27, 1906, *eight months after the date of the judgment*, for the first time mention was made of a writ of error in an order directing that the parties or their attorneys appear before the trial judge at Greensboro, N. C., on August 7, 1906, when the bill of exceptions would be settled and signed by the court; and it was further ordered that—

> When said bill of exceptions shall have been settled, signed, and sealed by the court, that after petition for writ of error and assignments of error shall have been filed by the defendant, a writ of error and citation in due form be issued and served, all of which shall bear date as of the 15th day of April, 1906, said date being the date on which said defendant filed

> its proposed bill of exceptions with the clerk herein, and within the period of six months from the date of the entry of the judgment herein aforesaid. (Rec., p. 20.)

The petition for a writ of error and the assignments of error were filed with the clerk September 13, 1906. (Rec., pp. 233, 257.) The order allowing the writ of error was made September 12, 1906 (Rec., p. 259), and upon the same day the writ and citation were issued. (Rec., pp. 260, 261.)

In the Circuit Court of Appeals the United States moved that the writ of error be dismissed, because—

> (1) It was not issued within six months after the entry of the judgment of the court sought to be reviewed, and
>
> (2) The district judge had no power to extend the time for issuing the writ. (Rec., pp. 264, 265.)

This motion was sustained by that court, and a judgment of affirmance was entered. (Rec., p. 279; see also opinion of court, pp. 275–279.) A petition for a rehearing was subsequently filed, but the rehearing was refused. (Rec., pp. 280–283.) Petitioner now seeks to have this court review the action of the Circuit Court of Appeals, and also consider the assignment of errors filed in that court.

ARGUMENT.

I.

The action of the Circuit Court of Appeals in holding that the petition for a writ of error was filed too late should be affirmed.

The statute governing this question is mandatory in its terms, and is too plain for misconstruction. It is therein provided—

> That no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit courts of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed. (26 Stat., p. 829, sec. 11.)

If petitioner had filed its petition for a writ of error and had made every effort to secure the issuance of the writ within the time prescribed by statute, and if it had been refused by the court, upon prompt and proper application to the Circuit Court of Appeals, that court would in all probability have given the relief to which petitioner would have been entitled; but as above shown, not a word was said about a writ of error until eight months after the judgment had been entered; and the trial court, instead of antagonizing petitioner and denying it any rights to which it was entitled, appeared anxious to restore to it, if possible, the right to a writ of error, which it had already lost.

The filing of a bill of exceptions is not a necessary prerequisite to obtaining a writ of error. As said by the Circuit Court of Appeals—

> The exceptions are noted during the progress of the trial and are known to the counsel for the plaintiff in error, and this notation is in fact the basis upon which the bills of exceptions are prepared. The assignment of errors can be formulated before the settling at length of the formal bills of exception.

But if the settling and filing of a bill of exceptions were a necessary prerequisite to the suing out of a writ of error, *the effect of the above-quoted statute would be to necessitate the filing of the bill of exceptions within six months after the judgment.* Nor could this necessity be obviated by agreement of the parties; but, as above shown, the United States attorney never consented that the preparation of the bill of exceptions should be postponed until after the six months had expired. (Rec., pp. 18–21.)

Every phase of the motion to dismiss was presented to and considered by the Circuit Court of Appeals, and there is nothing so peculiar or extraordinary in the question, or in its disposition by that court, as to require a review of the same by this court. That court felt that it was bound to take the course it did by the positive terms of the statute and the numerous decisions of this court, which were cited in their opinion, to wit: *Brooks* v. *Norris*, 11 How., 204; *Polleys* v. *Black River Co.*, 113 U. S., 81; *Scarborough* v. *Pargoud*, 108 U. S., 567; *Credit Co.* v. *Ark. Cent. Ry.*,

128 U. S., 258, 261; *Farrar* v. *Churchill*, 135 U. S., 609. See also *Fowler* v. *Hamil*, 139 U. S., 549, and *Cincinnati, etc., Co.* v. *Grand Rapids, etc., Co.*, 146 U. S., 54.

These decisions, we insist, are conclusive of this question, and the action of the Circuit Court of Appeals in dismissing the writ of error should therefore be affirmed.

II.

A corporation is subject to indictment and conviction for the offenses set forth in the first count of the indictment in this case.

The statute under which this count in the indictment was drawn provides that—

> Every person who engages in or carries on the business of a rectifier, *with intent to defraud* the United States of the tax on the spirits rectified by him, or any part thereof, * * * shall, for every such offense, be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than two years. (Sup. Rev. Stat., vol. 1, p. 233; 20 Stat., 339.)

It is insisted that a corporation, being without soul or intelligence, can not entertain an intent to defraud, and consequently is not indictable under this section.

It is well settled that the intent of the officers and agents may be attributed to the corporation, and that it may be held liable in an action, one necessary element of which is such intent.

P. W. & B. R. R. Co. v. *Quigley* (21 How., 202, 209, 210, 211) was an action brought against a corporation for the publication of a libel. It was insisted upon the part of the company that it was not guilty, because it was—

> A railroad corporation, with defined and limited faculties and powers, and having only such incidental authority as is necessary to the full exercise of the faculties and powers granted by their charter; that being a mere legal entity they are incapable of malice, and that malice is a necessary ingredient in a libel; that this action should have been instituted against the natural persons who were concerned in the publication of the libel.

This contention was overruled, the court saying:

> The result of the cases is, that for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances.

And the court quoted with approval the following from the decision of the House of Lords in the case of the *National Exchange Co. of Glasgow* v. *Drew*:

> I have come to the conclusion that if representations are made by a company fraudulently, for the purpose of enhancing the value of stock, and they induce a third person to purchase stock, those representations so made by them bind the company. I consider representations by the directors of a company as

> representations by the company, although they may be representations made to the company.

In *Milwaukee & St. Paul R. R. Co.* v. *Arms* (91 U. S., 489, 493) the court had under consideration the question when a defendant is liable for punitive damages, and said:

> In ascertaining its extent, the jury may consider all the facts which relate to the wrongful act of the defendant and its consequences to the plaintiff; but they are not at liberty to go farther, unless it was done willfully, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them.

And it was held that this rule applied to corporations as well as to individuals.

In *National Bank* v. *Graham* (100 U. S., 699, 702), in discussing the question when a national bank is liable for damages occasioned by the loss, through gross negligence, of a special deposit made in it, with the knowledge and acquiescence of its officers and directors, the court said:

> An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance, and for libel. In certain cases it may be indicted for misfea-

> sance or nonfeasance touching duties imposed upon it in which the public are interested.

In *Denver & Rio Grande Railway Co.* v. *Harris* (122 U. S., 597, 606, 609, 610) the facts were that certain officers and employees of the plaintiff company had armed themselves and attacked the employees of the Atchison, Topeka and Santa Fe Railroad Company, and had forcibly driven them away from that company's property, in doing which they had seriously wounded Harris, an employee of the latter company; and the main question was one of punitive damages. In commenting upon the facts, the court said:

> It is a plain case, on the proof, *of a corporation taking the law into its own hands and by force and the commission of a breach of the peace* determining the question of the right to the possession of a public highway established primarily for the convenience of the people.

And the court approved the charge of the court below, in which the jury had been instructed that—

> They were not limited to compensatory damages, but could give punitive or exemplary damages if it was found that the *defendant acted with bad intent and in pursuance of an unlawful purpose* to forcibly take possession of the railway occupied by the other company, and in so doing shot the plaintiff, causing him incurable and permanent injury.

And the court applied the principle laid down in *Day* v. *Woodworth* (13 How., 363, 371), that the act complained of must have been *conceived in the spirit*

of mischief or of criminal indifference to civil obligations; and, further commenting upon the charge of the court below, the court said:

> The jury were expressly restricted to compensatory damages, unless they found from the evidence that the defendant acted *with bad intent* and in pursuance of an unlawful purpose to employ force to dispossess the other company. The doctrine of punitive damages should certainly apply in a case like this, where *a corporation, by its controlling officers, wantonly disturbed the peace of the community* and by the use of violent means endangered the lives of citizens in order to maintain rights for the vindication of which, if they existed, an appeal should have been made to the judicial tribunals of the country.

Salt Lake City v. *Hollister* (118 U. S., 256, 262) was an action brought by the city against the defendant as revenue collector, to recover a sum of money which it alleged had been improperly collected from it as a tax upon spirits alleged to have been distilled by the city. It was insisted that inasmuch as the city charter contained no provision authorizing it to manufacture whisky it could not be guilty of doing so. The court quoted with approval the following from the case of *Reed* v. *Home Savings Bank* (130 Mass., 443, 445):

> It is too late to discuss the question, once much debated, whether a corporation can commit a trespass, or is liable in an action on the case, or subject generally to action for

> torts as individuals are. The books of reports for a quarter of a century show that a very large proportion of actions of this nature, both for nonfeasance and for misfeasance, are against corporations. * * * And, by the great weight of modern authority, a corporation may be liable, *even where a fraudulent or malicious intent in fact is necessary to be proved, the fraud or malice of its authorized agents being imputable to the corporation; as in actions for fraudulent representations, for libel or for malicious prosecution.*

In *Lake Shore, etc., R. R. Co.* v. *Prentice* (147 U. S., 101, 110), where the question of punitive damages was under consideration, the court quoted the following, with approval from *Lothrop* v. *Adams* (133 Mass., 471):

> The logical difficulty of imputing the actual malice or fraud of an agent to his principal is perhaps less when the principal is a person than when it is a corporation; still, the foundation of the imputation is not that it is inferred that the principal actually participated in the malice or fraud, but the act having been done for his benefit by his agent acting within the scope of his employment in his business, it is just that he should be held responsible for it in damages.

It is true that neither of the above cases was a criminal prosecution; but precisely the same question was involved in each of them as is presented in the present case, that is, whether or not the *intent* of the officers and agents of a corporation can be imputed to the corporation; or, in other words, can the cor-

poration *intend* to defraud the Government in such a way as to create liability.

In 1 Wharton Criminal Law, 87, it is said that—

> No good reason can be assigned why the same acts for which these bodies are subject to civil suit may not equally be the basis of criminal proceedings when they result in injury to the public at large.

And in 1 Clark & Marshall on Private Corporations, section 250, appears the following:

> It has also been said that a corporation can not be guilty of an offense involving the element of personal violence, as assault and battery, riots, etc., and there seems to be no reported case in which an indictment for such an offense has been maintained against a corporation. As we have seen, however, a corporation may be held liable in a civil action for an assault and battery committed by its officers or agents, and subjected to exemplary damages, *and there is no good reason why it may not be indicted and fined for such an offense.*

In section 249, *Id.*, it is said:

> Indeed the tendency of the late cases is to the effect that they may be indicted for offenses involving the element of malice or a specific intent.

In *The State* v. *The Passaic County Agricultural Society* (54 N. J. Law, 260, 263) it was held that a corporation was criminally liable for keeping a dis-

orderly house, and the court in its opinion made the following comment:

> In early days, when corporate bodies were few, it was a matter of comparatively small consequence whether such an action could be maintained. In these days, however, when the great concerns of business are carried on chiefly through these artificial persons, it would be most oppressive to hold that they are not amenable to answer for such wrongs as subject natural persons to prosecution.

In *State of Tennessee* v. *Atchison et al.* (3 Lea (Tenn.), 729) it was held that a corporation is indictable for a criminal libel.

In *Telegram Newspaper Co.* v. *Commonwealth* (172 Mass., 294) it was held that a corporation could be held liable for criminal contempt in publishing an article in a newspaper which was printed and circulated in the place where a trial was had, pending the trial, and which was calculated to prejudice the jury and prevent a fair trial.

In *Commonwealth* v. *Pulaski County Agricultural and Mechanical Association* (92 Ky., 197, 200) it was held that a corporation was liable to indictment for permitting gaming upon its fair grounds, the court saying:

> Experience showed the necessity of modifying the old rules, and the decided tendency of modern decision has been to extend the application of all legal remedies, both civil and criminal, to corporations and subject them

> thereto, as in the case of individuals, so far as possible. It is therefore now well settled in the courts of this country, as well as in England, that they are indictable for *misfeasance* or *nonfeasance* of duty unlawful in itself and injurious to the public.

In *United States* v. *Baltimore & Ohio R. R. Co.* (Fed. Cases, No. 14509), defendant was indicted under the statute providing that all spirits or other articles on which duties are imposed, which shall be found in the possession or custody, or within the control of any person or persons for the purpose of being sold by such person or persons *in fraud of the internal-revenue laws*, shall be seized and forfeited, and such person liable to a fine (13 Stat., 14); and both Circuit Justice Chase and District Judge Jackson were of the opinion that the corporation could be guilty of such offense.

We insist, therefore, that under a very great weight of modern authorities, a corporation can be held criminally liable for an offense which involves a malicious or fraudulent intent, and that this question has been practically settled by this court in its repeated holdings that a corporation can be held civilly liable in actions which necessarily involve malicious or improper intent, and can likewise be held liable for punitive damages when such damages can not be assessed in the absence of a wilful act, or such a degree of negligence as will imply a wilful purpose to injure.

III.

Plaintiff in error can not rely upon any of the grounds mentioned in his assignment of errors for a new trial, because his motion in arrest of judgment preceded his motion for a new trial.

It is shown by the minutes of the court that the motion in arrest of judgment was made and overruled before the motion for a new trial was entered. (Rec., p. 17.) See also bill of exception No. 26. (Rec., p. 232.) The motion in arrest of judgment was, therefore, a waiver of the motion for a new trial. (2 Ency. Plead. & Prac., p. 818, and cases cited.)

IV.

The assignment of errors on which plaintiff in error seeks a new trial should be disallowed because they are based upon the refusal of the trial court to charge certain requests, when the requests mentioned were presented along with many others, a very large number of which should have been refused, and no special exception was taken to the action of the court in failing to charge either of said requests.

It appears that at the close of the testimony defendant's counsel presented to the court prayers for special instructions to the jury, numbering 185 and covering 60 typewritten pages. The introduction to these requests is in the following language:

> Now come the defendants (naming them), at the close of the testimony, in apt time, and before the beginning of the argument, and request in writing of the court the following special instructions: (Rec., p. 21.)

Then follow the one hundred and eighty-five requests which cover pages 21–65 of the record, very many of which relate to counts in the indictment which were withdrawn from the jury by the court, and but comparatively few of which plaintiff in error now claims the court erred in refusing to charge.

It further appears in the record that—

> No objection was made by defendants' counsel to any particular part of the charge, or proposition of law as stated therein, as delivered, nor any exception noted to the refusal of the court to give any particular one, by number or in substance, of the requested instructions, but defendants' counsel did then and there file the following paper: (After style of case and court in which pending.)
>
> Exceptions to refusal to charge defendants' requests, etc.
>
> The defendants, while the jury are still in the jury box, and at the bar, respectfully except to his honor's refusal to charge each and every of their special prayers for instructions, which were refused by him, and they further except to the modification of each and every of their special prayers for instructions, which were modified by him; and they still further except to the giving of such instructions and to the giving of each of them so modified. (Rec., p. 85.)

In each bill of exception, which is made to preserve an exception to the court's action in refusing to charge a request, this same general exception is repeated and relied upon. (Rec., pp. 182–231.)

A general exception of this character to the action of the court in refusing to charge a series of requests, either one of which should have been refused, is insufficient, and no assignment of error based thereon will be considered by this court.

Harvey v. *Tyler*, 2 Wall., 328.
Worthington v. *Mason*, 101 U. S., 149.
Moulor v. *Amer. L. Ins. Co.*, 111 U. S., 335.
Black v. *Darling*, 140 U. S., 239.
Boyk v. *Gossert*, 149 U. S., 26.
Allis v. *United States*, 155 U. S., 122.
Balt. & O. R. R. v. *Mackey*, 157 U. S., 92.

V.

The assignment of errors calling in question the court's refusal to charge certain requests relating to the testimony of Revenue Agent Chapman and others are not well taken.

These parties, while the suit was in progress, made a test of the capacity of a distillery which had belonged to defendant and which the Government insisted was still being operated by it, although the legal title was in another, and in their evidence before the jury they described the result of this test. It is especially insisted that the court should have charged the one hundred and second request, to the effect that this evidence should be considered only in connection with the twelfth count of the indictment, in which plaintiff in error was charged with carrying on the business of a distiller with intent to defraud the United States. (Rec., pp. 12 and 102.) Plaintiff in error was acquitted of that offense and found

guilty of the first count of carrying on the business of a rectifier with intent to defraud the United States. The court, in its general charge, explained fully the difference between a distiller and a rectifier. (Rec., pp. 67–70.) And if this evidence had no bearing except upon plaintiff in error's business as a rectifier, any intelligent person would so understand without being expressly told, and consequently the refusal of the court to charge this request was, upon that assumption, harmless.

But it is not altogether certain that this evidence had no bearing upon the charge contained in the first count. The theory of the Government was that plaintiff in error in fact owned and operated both the rectifying plant and a distillery, though the title to the distillery was in the name of another; that the two were operated in such a way that a large amount of whisky produced by the distillery was never accounted for and no tax paid thereon, but passed through the rectifying plant; and any evidence which tended to show the capacity of the still and that a larger amount of whisky was made than was reported, would tend to show not only fraud in operating the distillery, but also fraud in operating the rectifying plant. The trial judge had heard all the testimony, which was very voluminous, and was more familiar with the evidence upon which the United States relied than this court can possibly become, because he had the witnesses before him, and the evidence as it appears in the record is in

a very abbreviated form; and this court will not undertake to review his opinion that the statements of these witnesses did have a bearing upon some of the counts left for the consideration of the jury other than the twelfth.

VI.

The seventh, eighth, and ninth assignments, which relate to the refusal of the court to charge certain requests to the effect that under the first count the intent was a necessary ingredient of the offense charged, are not well taken, because the court embraced this principle in his general charge.

In speaking of the first count of the indictment, the court said:

> The first count, as it is called in this indictment, is drafted under section 3317 of the Revised Statutes. This count in the indictment charges that the Old Nick Williams Company, a corporation, N. Glenn Williams and D. E. Kennedy, carried on the business of rectifiers of distilled spirits *with intent* to defraud the United States of the tax upon spirits rectified by them.

And then the court read said statute to the jury. (Rec., p. 70.) And subsequently, in detailing to the jury the various contentions of the Government, the court said:

> It insists that if these positions of the prosecution be true, these defendants have violated these statutes; that they have carried on the business of rectifiers, although ostensibly in the name of the company, yet really by the

> three acting in concert, with intent to defraud the United States of the tax upon the spirits which were rectified in that establishment. (Rec., p. 74.)

It is apparent that no member of the jury could have failed to understand that the intent to defraud the United States was a necessary ingredient of the offense charged in this count; and that the portion of the charge which related to a reasonable doubt applied to the intent as well as to all other essential elements of the offense. Plaintiff in error's bills of exceptions, in which it undertakes to preserve its exceptions to the action of the court in declining to charge these requests, fail to show what was contained in the general charge upon this subject (Rec., pp. 200–203); and said bills of exceptions, therefore, fail to affirmatively show that said action of the court was erroneous.

VII.

The court did not err in refusing to charge the requests mentioned in the tenth, eleventh, and twelfth specifications of error, which relate to the entering on the books of plaintiff in error packages purchased by it as a retail dealer.

It appears that plaintiff in error was both a wholesale and a retail dealer, and that the Internal Revenue Commissioner had issued a regulation requiring wholesale liquor dealers, when carrying on also the business of retailers, to keep a record of all packages brought in and transferred to their retail business.

The court charged the jury in substance that such a regulation was reasonable, and that while its viola-

tion was not a criminal offense, yet it might be considered by the jury as evidence tending to support the theory of the Government. (Rec., pp. 82, 212.)

This instruction was unquestionably correct. The evasion of such a regulation, which was adopted for the purpose of enabling the Government to ascertain what whisky had been disposed of through each of the two departments of such dealer, was very strong evidence of guilt, and the jury should not have been told to disregard such a regulation, which would have been the effect of charging the requests as presented.

VIII.

The court did not err in refusing to charge the requests set out in the twelfth, thirteenth, fourteenth, and fifteenth specifications of error, which in effect asked the court to charge the jury that plaintiff in error could not be convicted by the evidence of the amount of spirits it had purchased alone, and that it was not required to show from whom and under what circumstances it purchased such spirits.

The court, in his charge, laid down the general rules of evidence, and dwelt at length upon the potency of circumstantial evidence and the character and amount of evidence necessary to justify a conviction (Rec., pp. 76, 77), and a trial court can not be required to charge separately as to the effect of every little detached item of evidence. The jury fully understood from the court's charge that the matters mentioned in these specifications

were only mere circumstances to be looked to by them; and, moreover, it is not correct that the proof of sales made by plaintiff in error of large quantities of whisky would not place any burden upon it to explain in any way or account for its possession. If sales were made of unreasonable quantities, such fact, without an explanation as to whence and under what circumstances obtained, would be a strong circumstance against it.

IX.

It was unnecessary for the court to charge the request contained in the twenty-first bill of exception (Rec., p. 220), with reference to the effect to be given certain acts of plaintiff in error in making a shipment of whisky under the label of canned goods.

The jury fully understood from the court's charge that they could not convict plaintiff in error for this act. The court, in fact, excluded from the jury the consideration of all offenses except those embraced in four counts, and thus in effect told them that plaintiff in error could not be convicted for any offense not specified in those counts.

X.

The one hundred and eighty-third request (Rec., p. 65), to the effect that, inasmuch as the several counts in the indictment charged that all the defendants were jointly guilty, neither could be found guilty unless they were all proven guilty, does not state the law and should have been refused.

For the foregoing reasons the action of the Circuit Court of Appeals in dismissing the writ of error should be sustained, or if not, then the judgment of the District Court should be affirmed.

J. A. FOWLER,
Assistant Attorney-General.

JANUARY, 1909.

O

OLD NICK WILLIAMS COMPANY *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 26. Argued November 9, 10, 1909.—Decided January 24, 1910.

A writ of error is not actually brought until filed in the court which rendered the judgment, and the same rule is applicable to appeals. *Credit Company* v. *Arkansas Central Railway*, 128 U. S. 261.

The statutory time for taking appeals from one Federal court to another is prescribed by act of Congress and must be calculated accordingly; it cannot be extended by order of the court.

Assignment of errors does not require the previous settlement of the bill of exceptions, and failure to file the writ within the statutory time is not excused because there was delay on the part of the trial judge in settling the bill.

Assignment of errors is not a jurisdictional requirement; and, although by the rule errors not assigned are disregarded, the court at its option may notice a plain error not assigned or specified.

152 Fed. Rep. 925, affirmed.

THIS was an indictment in the District Court of the United States for the Western District of North Carolina against the Old Nick Williams Company, a corporation which was authorized to carry on the business of a rectifier, and which was convicted of violating the second paragraph of § 3317 of the Revised Statutes by the verdict of a jury finding it guilty of carrying on the business of a rectifier with intent to defraud the United States of the tax on the spirits rectified by it. The verdict was rendered November 28, 1905, and motions to set aside the verdict and for new trial and in arrest of judgment were severally made and overruled, and thereupon judgment was entered on that day sentencing defendant to pay a fine of $5,000 and be taxed with the costs. On the same day it was ordered that the defendant have ninety days to prepare its bill of exceptions, and that the attorney for the United States have

thirty days, after being served with the defendant's bill of exceptions, to make objections thereto, and that the court would settle the bill of exceptions upon ten days' notice to the attorneys of the parties, and that when filed the bill of exceptions should be deemed as made in ample time.

January 17, 1906, by consent of the parties, the court by its order further extended the time for preparing and filing defendant's bill of exceptions to March 15, 1906, and afterwards extended the time to April 1. On July 27, 1906, the court, over the objection of the attorney for the United States, made an order which recited that defendant had filed with the clerk its bill of exceptions, to which the United States attorney had filed certain objections and proposed amendments, so that the bill of exceptions had not been settled and signed by the court within six months from the date of the entry of the judgment, and the court, being of opinion that defendant was entitled, under the circumstances, to have the bill of exceptions settled and a writ of error and citation issued and served *nunc pro tunc* as within the time required by law, directed that the attorneys should appear before him August 7, 1906, and have the bill of exceptions settled and signed by the court, and further ordered that when the bill of exceptions was settled and signed and after a petition for a writ of error and assignments of error had been filed by defendant, the writ of error and citation in due form should be issued and served, all to bear date as of the fifteenth of April, 1906, that being the date on which the defendant filed its proposed bill of exceptions with the clerk, and which was within six months from the entry of the judgment. Thereafter, on September 12, 1906, defendant, having presented its petition for the allowance of a writ of error and its assignment of errors, the court signed an order allowing the writ of error and directing that the writ of error and citation when issued bear date April 15, 1906. Thereupon the writ of error was issued on September 12, 1906, as of April 15. The attorney for the United States moved to dismiss the writ of error because not sued out within six months after the entry of

the judgment. The statute restricting the time for writs of error in such cases is § 11 of the act of Congress of March 3, 1891 (26 Stat. 826, 829 c. 517), and reads:

"SEC. 11. That no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit courts of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed."

The writ was dismissed for the reasons given in the opinion by Morris, J., reported in 152 Fed. Rep. 925.

Mr. Charles A. Moore, with whom *Mr. William P. Bynum* was on the brief, for petitioner.

Mr. Assistant Attorney General Fowler for the United States.

MR. CHIEF JUSTICE FULLER, after making the foregoing statement, delivered the opinion of the court.

The rule has long been settled that "a writ of error is not brought, in the legal meaning of the term, until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of Congress must be calculated accordingly." Taney, C. J., in *Brooks* v. *Norris*, 11 How. 204; *Polleys* v. *Black River Company*, 113 U. S. 81; *Credit Company* v. *Arkansas Central Railway*, 128 U. S. 258; *Farrar* v. *Churchill*, 135 U. S. 609; *Conboy* v. *Bank*, 203 U. S. 141.

The same rule is applicable to appeals as to writs of error. Section 1012, Revised Statutes. As Mr. Justice Bradley said in *Credit Company* v. *Arkansas Central Railway*, 128 U. S. 261:

"An appeal cannot be said to be 'taken' any more than a writ of error can be said to be 'brought' until it is, in some way, presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the appellate court."

There the appeal was allowed by Mr. Justice Miller on the last day on which an appeal could be taken (Revised Statutes, § 1008), but was not presented to the court below nor filed with the clerk until five days after the prescribed time had expired. It was held that the appeal must be dismissed, and Mr. Justice Bradley added:

"The attempt made, in this case, to anticipate the actual time of presenting and filing the appeal, by entering an order *nunc pro tunc*, does not help the case. When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter."

In *Farrar* v. *Churchill*, 135 U. S. 609, it was held that a cross appeal in equity, like other appeals, must be entered within the time limited, calculating from the date of the decree, and because in that case petition, order and bond were not filed in the Circuit Court until after the lapse of two years from the entry of the decree the cross appeal was dismissed. It was ruled also that the failure to file an assignment of errors, although required by the act of Congress, and the rule of court, was not jurisdictional and could be waived. Revised Statutes, § 997; Rule 11; *School District* v. *Hall*, 106 U. S. 428.

In *Conboy* v. *Bank*, 203 U. S. 141, it was held that the time within which an appeal may be taken under § 25*b* of the bankruptcy act and general order in bankruptcy XXXVI runs from the entry of the original judgment or decree, and when it has expired is not revived by a petition for a rehearing, and that where the right of appeal has been lost, appellant cannot reinvest himself with that right by filing such petition, and *Credit Company* v. *Arkansas Central Railway*, 128 U. S. 258, 261, was cited with approval.

Plaintiff in error contends that the delay in settling the bill of exceptions was not its fault, but was attributable to the judicial engagements of the trial judge, and that until the bill of exceptions was settled its counsel could not intelligently

prepare the assignment of errors which should accompany the petition for the writ of error. But the assignment of errors does not require the previous settlement of the bill of exceptions, and can be formulated before that takes place. In *Waldron* v. *Waldron*, 156 U. S. 361, cited in the opinion of the Court of Appeals, the judgment was entered July 10, 1890, and the writ of error was dated July 15, 1890, but the bill of exceptions was not settled during the term, and, because of subsequent delays, not until February, 1891, yet this court held it to be in time in the circumstances. But the writ of error had already issued and been deposited with the clerk of the trial court, and after that the time for complying with it might by proper authority be enlarged. *Mussina* v. *Cavazos*, 6 Wall. 355.

As we have stated, the assignment of errors is not a jurisdictional requirement, and although by the rule errors not assigned would be disregarded, the court might at its option notice a plain error not assigned or specified.

The delay in the present case in taking out the writ of error was not the act of the court, but of plaintiff in error. At all events, plaintiff in error might have brought its writ of error within the time prescribed by statute, and the court had no power to allow it after the time limited had expired.

Judgment affirmed.